Supreme Court U. S.
FILED
NOV 30 1888
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

No. 118, OCTOBER TERM, 1888.

Schraeder Mining and Manufacturing Co.,

Plaintiff in Error, Defendant Below,

vs.

Elisha A. Packer,

Defendant in Error, Plaintiff Below.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1888, No. 118.

SCHRAEDER MINING AND MANUFACTURING COMPANY

vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

I.

STATEMENT OF THE CASE.

This was an action of *trespass quare clausam fregit* originally brought in the Court of Common Pleas of Bradford county, Pennsylvania. After some amendments of the record, according to the practice in the courts of that State, with respect to the parties plaintiff and defendant, such record finally stood as that of a suit in which Elisha A. Packer was sole plaintiff and Schraeder Mining and Manufacturing Company sole defendant.

The case was tried once before arbitrators, and after appeal from their award, three times in the Court of Common Pleas of Bradford county aforesaid. On the first trial there was a judgment for the defendant, which, on error to the Supreme Court of Pennsylvania, was reversed. The verdicts rendered on the other trials were set aside by the trial court.

On plaintiff's application, the cause was removed to the Circuit Court of the United States for the Western District of Pennsylvania.

Here it was tried in May, 1885, before Mr. Justice Bradley and Judge McKennan, of the Circuit Court, and judgment having been entered in favor of the plaintiff this writ of error was taken.

The plaintiff below claimed title to a tract of land granted by the Commonwealth of Pennsylvania in the warrantee name of George Moore, containing about four hundred acres of land, alleged to have been surveyed November 21, 1792, and deduced a regular paper title to the said tract.

The defendant claimed title to a tract granted by the Commonwealth in the warrantee name of Andrew Tybout, containing about four hundred acres of land, alleged to have been surveyed March 24, 1794, and deduced a regular paper title thereto.

The question presented upon these titles was one relating to location of survey. As to the location of the defendant's Andrew Tybout tract there was no dispute.

The two tracts were substantially in the form of oblong squares, the greater length of the Moore being in direction northerly and southerly, that of the Tybout easterly and westerly. It was alleged by the plaintiff that the northern line of the Moore survey coincided with the northern line of the Tybout survey, thus over-lapping it to the extent of about three hundred and twenty-five acres, this land thus constituting the *locus in quo*, and claimed as belonging to the plaintiff by priority of survey. It was alleged by the defendant that the Moore tract as actually surveyed and marked upon the ground, extended no further north than the southerly line, or side, of the Tybout tract, thus exclud-

ing any interference of survey. The return of the Moore as laid down on paper, supported the contention of the plaintiff, and the question arose on the trial, upon offers of evidence by the defendant, which were excluded upon rulings of the Court, duly excepted to, (Transcript, p. 31,) whether evidence was admissible to show that the Moore was actually surveyed, marked and located upon the ground as alleged by the defendant. The plaintiff contended that as the Moore survey had been returned over twenty-one years, a presumption *juris et de jure* had arisen that the tract had been surveyed according to its paper return and this contention was sustained by the Court. (Transcript, p. 31.)

Notwithstanding the exclusion of the evidence thus offered, the nature of which is set forth in the bill of exceptions, is nowhere objected to on the ground of sufficiency, and which is hereinafter particularly referred to, there was other evidence in the case, in connection with which the defendant's excluded evidence was offered, which it was contended was sufficient to be submitted to the jury in support of the defendant's contention that the northern line of the Moore tract, as actually surveyed and marked upon the ground, coincided with the southern line of the Tybout tract. Points of change raising this question were duly submitted, but the court adhered to its view of the law taken in excluding the defendant's offer, and ruled in substance that the location of the Moore, as shown by its paper return, the same being upwards of twenty one years old, could not be questioned by a party claiming under a junior survey. (Transcript, p. 39.)

Thus were presented the questions to be discussed relating to the title to the land in question, and which are assigned for error in specifications three, four, five, six, and seven. (Transcript pp. 52–57.)

It was further contended by the defendant that the legal and actual possession of the *locus in quo* was in the defendant, and not in the plaintiff, at the time of the alleged commission of the injury complained of. The facts vesting this possession are set forth in the bill of exceptions as follows:

The evidence of the defendant on this subject tended to show the following facts:

That soon after the purchase by the plaintiff of certain lands which adjoined the Shraeder lands on the east for two or three miles or more and included the *locus in quo* he employed Jacob Dewitt as his agent or attorney with reference to his said lands; that as such agent said Dewitt had full power and control of the lands and to protect them from depredations and from any trespasses being committed upon them. Mr Packer had never seen the lands, and resided in the city of New York, upwards of two hundred miles distant therefrom.

Dewitt also attended to the payment of taxes on the lands and conducted some negotiations for Packer with reference to a proposed sale of them. Packer had no other agent as to the lands. While DeWitt's authority was such, the Schraeder Land Company, in 1866, contemplated the erection of a sawmill and extensive lumbering operations. Its affairs were managed by an executive committee composed of Chas. F. Welles, Jno. F. Means, and V. E. Piollet. They determined to establish and paint a boundary line of the Schraeder lands as a guard against trespassing upon adjoining owners, and so informed Jacob Dewitt, as agent for Packer. Dewitt was at this time an attorney-at-law, a stockholder in the Schraeder Land Company, and was occasionally consulted professionally by that company, drew contracts for it, &c.

It was considered by said committee, and Dewitt, representing Packer, assented, that Z. F. Walker would be a suitable person to run and establish the boundary line between the Schraeder lands and the Packer lands, and he was accordingly selected for that purpose.

He was not informed of any concert of action between Dewitt, as the agent for Packer, on the one hand, and the Schraeder Land Company on the other. He was employed by the executive committee of the Schraeder Land Company, and he was paid by that company. His instructions were to establish and paint the boundary line of the Schraeder lands. He had in his possession at this time a copy of the map of 1799, called the Broadhead map, a map made by Major Flowers of his re-survey of 1828, and the field-notes of Major Flowers made in 1828, before referred to; also in his possession or access to a copy of a map of the Vaughan or Priestly lands, including the George Moore, and showing the warrant number of the Moore according to the map attached to the deed of 1805.

In making his surveys in 1860 of the Schraeder lands, Walker had delineated the George Moore interference on a map made by him and given to the Schraeder Land Company, showing the interference as claimed by the plaintiff, except as to the western boundary line, which was laid down on the map as corresponding to the line of 1798, mentioned heretofore in these exceptions. No maps or documents were furnished Walker by either the Schraeder Land Company or Jacob Dewitt to aid him in establishing the boundary.

After the line was painted Jacob Dewitt and the executive committee went by rail some sixteen miles from Towanda to the foot of the plane, the railway station nearest the Schraeder lands, and from thence Dewitt and two or three of the committee went up the Schraeder creek to examine the painted line. They met Walker at the foot of the plane, who informed them that he had found some marks of an interference of survey on the Tybout tract, but that he had put the line where he believed it ought to be, and where it always had been. Dewitt and the members of the committee then went on the painted line, which was on the north, east, and south boundaries of the Andrew Tybout tract, and examined some portion thereof. Here Dewitt stated to the members of

the committee who were with him that he was satisfied the interest he represented would be protected by the painted line; that he would thereby come into possession of the strip some thirty rods wide, running some two or three miles adjoining the Schraeder lands, (referring thereby, as the defendant claimed, to the lands between the 1798 line, before mentioned herein, and the Broadhead line.) He also stated to the committee that they might go on and build their mill and cut up to the painted line.

This happened about the first of August, 1866. In the following fall two members of the said executive committee went to New York to see Mr. Packer and assure themselves of Mr. Dewitt's authority for establishing the painted line. They did see Mr. Packer, and informed him of what had been done in reference to running the line and fixing the line between the Packer lands and the Schraeder lands; that Mr. Dewitt, in association with a committee of the Schraeder Land Company, had caused to be run and painted a line the whole length between the two parties, Mr. Dewitt acting for Mr. Packer. To this Mr. Packer replied [that] he had never been on the lands; that Mr. Dewitt was his attorney, and that what Mr. Dewitt did he consented to.

Subsequently, about 1869, Dewitt stated to one of the directors of the Schraeder Mining and Manufacturing Company that he had been informed that company had trespassed upon Packer's lands. Dewitt and the said director went upon the lands and followed the painted line, and finding no cutting had been done beyond it, expressed himself as satisfied.

Upon the subject of the alleged agreement as to the painted line the court charged the jury—

"1. The contention of the defendant that its title to the land in dispute became established and valid as between itself and the plaintiff by the consent and acquiescense given by Jacob Dewitt, the plaintiff's agent, to the painted line made by Mr. Walker in 1866 cannot be admitted.

"The assent given to that line by Jacob Dewitt was not given to it as a compromise line yielded to for the purpose of ending a dispute or difference between the parties, for there was no such dispute or difference. They had no knowledge that the George Moore survey belonging to the plaintiff interferred with the Andrew Tybout survey of the defendant's predecessors and grantors.

"The intimation thrown out by Mr. Walker, in presence of Jacob Dewitt, (if such was the fact,) that there was some interference on the Tybout tract was not sufficient notice of the interference that actually existed, especially as Mr. Walker immediately added that he had put the line where he thought it ought to be and where it always had been.

"No question of title had arisen between the parties, and this observation of Walker, if made at all, was not such as to awaken Dewitt's mind to the character of the conflict that actually existed between the titles.

"2. It cannot be conceived for a moment that if the plaintiff or his agent had known of this interference (his being the superior title) he or his agent would ever have consented to the line that was run.

"If with full knowledge of his rights he had consented to it, it would have presented a different question.

"But there is no evidence that he or his agent, or those acting for the Schraeder Company, had any knowledge or notice of it whatever.

"It was a clear, mutual mistake, one that ought not to conclude or bind the plaintiff to the loss of his land.

"3. It is a question of error and mistake. It is not a question of consentable or compromise line at all.

"In our opinion there is not sufficient evidence in the case to be submitted to the jury for them to deliberate on the question whether the painted line was a compromise line knowingly adopted by the parties so as to bind them in reference to the now acknowledged interference of the surveys.

"4. But in our view this case, in which a boundary line has been adopted by mistake, has nothing of license in it. There was no intention to give a license. The transaction has not a single element of license. It was simply a mutual mistake in the location of the line which was suppose-to separate the respective lands of the parties.

"5. We charge you, therefore, that if the painted line was assented to by the plaintiff's agent in ignorance of the true boundaries of the plaintiff's land, and in ignorance of the interference between the Moore and the Tybout surveys, then the defendant was not protected by that line from the action of trespass in taking and carrying away the timber from the plaintiff's land, and as there is no sufficient evidence to show that the plaintiff or his agent knew the true boundaries, and knew of the interference between the said surveys at the time of the cutting, you are to presume under the circumstances of the case that they were ignorant of the same."

Upon this subject the defendant submitted the following points:

4. That if the jury believe that Jacob Dewitt had charge of the Packer lands, and was authorized to protect them from depredation, and had knowledge of the defendant's claim of title up to the painted line, and of the painting of such line in assertion of such claim, and that said Jacob Dewitt did not object to the painting of said line, but acquiesed therein and assented thereto, the jury would be warranted in finding the actual possession of the disputed lands to have been in the defendant when the alleged trespasses were committed, provided they believe the evidence of the defendant as to the surveys and other acts of ownership done upon the ground by the defendant, together with payment of taxes, and if they do so find the actual possession to have been in the defendant the plaintiff cannot recover.

5. That if the jury believe that Packer authorized Jacob Dewitt to establish the Tybout line as painted, or subsequently consented to such establishment, and that the same was established in good faith, the plaintiff cannot recover.

6. That if the jury believe that Jacob Dewitt had charge of Packer's lands, and was authorized to protect them from depredations, and in pursuance of such charge and authority consented to the establishment of the painted line, and the defendant in good faith relying on such consent took the timber, the plaintiff cannot recover.

The several portions of the charge above quoted were specifically excepted to by the defendant below, and also the refusal of the court to charge as requested in the defendant's points, numbered respectively four, five and six. (Transcript, pp. 40, 41.)

The questions thus raised are presented by specifications of error, numbered eight, nine, ten, eleven, twelve, thirteen, fourteen, and fifteen. (Transcript, pp. 57–59.)

On the subject of damages to be recovered by the plaintiff, a question arose as to the time to which the plaintiff was entitled to damages, which question arose as follows:

The defendant gave in evidence a deed from plaintiff to Jacob Dewitt, dated November 2, 1869, duly executed and acknowledged on the same day, purporting to convey absolutely and without condition certain lands, including the *locus in quo*, to the said Dewitt in fee, a copy of which deed is annexed to the bill of exceptions, (Transcript, p. 49,) and marked Exhibit Q. It is in the common form of a deed with covenant of general warranty.

In rebuttal of this the plaintiff gave in evidence a certain article of agreement between himself and Jacob Dewitt, a copy of which is hereto annexed and marked Exhibit "R."

EXHIBIT R.

This article of agreement witnesseth: That E. A. Packer,— the city of New York, has this day entrusted to Jacob Dewitt, of Towanda, Bradford county, Pennsylvania, a certain

deed of said Packer to said Jacob Dewitt, dated November 2nd, 1869, and purporting to convey eleven certain tracts of land situate in Bradford county, Pennsylvania, and surveyed in the warrantee names following: George Moore, Samuel Cooley, James Hardy, Samuel Fritz, James Betz, John Betz, Joseph Betz, Samuel Hardy, Henry Seeley, Joseph Seeley, and Henry Bryson, particularly described in said deed for the purpose following and none other; that — the said J. Dewitt pay to the said E. A. Packer, within twenty days from the date hereof, the full and just sum of sixteen thousand dollars, then the said deed to be in full force and virtue; otherwise the said deed to be returned to said E. A. Packer, it being the true interest and meaning of this agreement, and the arrangement referred to, that the said deed vests no title whatever in said grantee until the purposes and conditions which it is entrusted to him, as herein set forth shall be fully performed.

Witness my hand and seal this 2d day of November, A. D. 1869.

(Sig.) JACOB DEWITT.

I hereby certify that the above is a true copy of the original.

JOS. J. CARTER.

In connection with this paper the plaintiff testified that the said Dewitt did not comply with the conditions therein expressed, but that subsequently, to wit: About October 1, 1870, the said conditions were complied with and the plaintiff sold him the land. As to the effect of the deed of November 2, 1869, the defendant submitted the following points:

7. That the conveyance from Packer to Dewitt took effect from November 2, 1869, for all the purposes of this case.

8. That there can be no recovery in this case for timber removed from the disputed territory subsequent to November 2, 1869.

The plaintiff claimed damages for a large amount of timber

cut and lying on the ground, November 2, 1869, and subsequently removed.

These points were declined by the court, and the court, on the contrary, charged the jury that the plaintiff, if entitled to recover at all, was entitled to recover damages for all cutting and carrying away of timber from the disputed premises up to the time that he actually sold the property to Jacob Dewitt, which, according to his testimony, was the first day of October, 1870.

This action of the Court was duly excepted to, (Transcript, pp. 33, 41, 26,) and is here assigned for error in specifications numbered sixteen and seventeen.

II. SPECIFICATIONS OF ERROR.

Writ of Error to the Circuit Court of the United States, Western District of Pennsylvania.

In the Supreme Court of the United States.

SCHRAEDER MINING AND MANUFACTURING COMPANY, Plaintiff in Error, Defendant below,

vs.

ELISHA A. PACKER, Defendant in Error, Plaintiff below.

Assignments of Error.

And now comes the Schraeder Mining and Manufacturing Company, plaintiff in error, defendant below, and here respectfully assigns the following errors manifest upon the record of this cause, (*prout* the said record,) to wit:

I. The learned Court erred in refusing to remand this cause to the State court from which it originated.

II. The learned Court erred in refusing to allow defendant below to plead the statute of limitations.

III. The learned Court erred in excluding the following offer of evidence made by the defendant below on the trial of the cause. The offer was as follows:

In connection with this evidence the defendant offered to give further evidence, founded on examinations made upon the ground by surveyors in connection with the maps and other documents already in evidence, to show that the Moore warrant was not actually surveyed on the ground according to its return of survey, but that it was surveyed, together with the Cooley and other warrants to the south of it, in one block, of which the Moore was the northern member; that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corners corresponding to what was claimed by the de-

fendant to be the south line of the Andrew Tybout tract; that no line of 1792 was surveyed on the ground for the Moore warrant north from the hemlock sapling corner, nor west from the hemlock northeast corner of Tybout tract; that the line south from the hemlock northeast corner aforesaid was run for warrants to the east of said line, and was adopted merely by the return of the Moore.

To this evidence the plaintiff objected on the ground that twenty-one years and upwards having elapsed from the date of the Moore survey there was a presumption, *juris et de jure*, that the said survey was made as returned, and the evidence was therefore inadmissable.

The court sustained this objection and excluded the evidence so offered, and thereupon the defendant did then and there except to the said ruling and to the exclusion of said evidence, and at its request this bill of exceptions was then and there noted and is now signed.

The evidence in connection with which the foregoing offer was made is stated in the bill of exceptions as follows:

The defendant alleged that the plaintiff's tract was never actually surveyed upon the ground north from the hemlock sapling to the sugar corner corresponding to the south line of the Tybout survey, and in support of its allegation relied upon the following evidence, which appeared in the cause:

As a part of his chain of title the plaintiff put in evidence a deed tripartite dated October 25, 1805, between Joseph Priestley and wife, of the first part; John Vaughan, of the second part, and Thomas Fitzsimmons, John Miller, junior, and Robert Bird, trustees for certain creditors of John Vaughan, of the third part, which recited that "Forasmuch as divers inaccuracies have been discovered in the original surveys made of several of the tracts which in the division aforesaid fell to the lot of them, the said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, trustee aforesaid, the same have therefore been since resurveyed and are now more accurately designated in the annexed draft thereof

representing each tract as it is actually surveyed and marked upon the ground (mentioning subsequently, *inter alia*, the George Moore warrant, and giving also its fancy name of Greenfield), all which tracts are distinguished and marked on the annexed plan by numbers corresponding with those above enumerated, and are represented and described by the said annexed plan of the resurvey thereof as actually resurveyed and marked on the ground as aforesaid," and to which was attached a certain map referred to therein, which map was also given in evidence by the plaintiff. A full copy of the said tripartite deed is hereto annexed and marked Exhibit K.

The width of the George Moore warrant, as shown by this map, was 200 rods, which corresponds with the distance laid down in the return of survey, but the call in the return for for General Broadhead's lands gives the Moore survey an additional width of about thirty rods. The said map showed the George Moore lot in the same position as in the survey thereof with regard to the surrounding lots of Henry Betz, Joseph Betz, and Samuel Cooley.

It was also shown by the plaintiff's surveyors, or one of them, that beginning on the north line of the Moore survey, as located on the ground by its return, at a point two hundred rods westerly from the hemlock, northeast corner, a line extended from a corner marked in 1798 nearly parallel with the east line, projected southerly, which was run in 1798 for about three miles and sixty-four rods, where it ended, and an offset was thence made to the west to an undisputed line of 1792, bounding the Broadhead or Barclay lands on the east, the plaintiff's surveyor testifying that the said line of of 1798 was evidently a trial line. Said Broadhead line ran about thirty rods distant from and nearly parellel with said line of 1798 and extended from the hemlock sapling corner before mentioned a distance of five or six miles southerly.

Plaintiff's evidence also showed a general survey of 1798 to have been marked on a number of the tracts mentioned in said deed of 1805. The map attached to said deed

in laying down the George Moore survey thereon, and other surveys south of the same, laid them down as 200 perches in width, being the width called for in the official surveys, and being about thirty perches less in width than the actual distance to the old line of the Broadhead lands called for in said survey, and it was claimed by the defendant that the map thus showed the George Moore warrant was bounded on said map by the line of 1798 aforesaid.

No other general survey of the lands mentioned in said deed of 1805 was made between the dates of the warrants and the date of the deed of 1805.

It was shown by one of plaintiff's surveyors that in 1860 he made a survey of the Barclay lands for their owners, he having then in his possession the field notes of his grandfather, one Major Zephon Flowers, whose work has been found dating as early as 1795, and who surveyed and mapped the Barclay lands for their owners in 1828.

That on said survey of 1860 the said surveyor, one Z. F. Walker, found the corner of 1798 at the north end of said line of 1798, and also followed the said line of 1798, either then or in 1866 to its end; that in 1860 he searched northerly from the hemlock sapling corner for a line of 1792, but found none.

That he surveyed the said lands in 1866 for their owners, and afterwards in 1880 for the plaintiff, but on neither survey did he find any marks of 1792 north from the hemlock sapling corner (no timber being left north of Schraeder creek on this line after 1867 or 1868) nor west from the hemlock northeast corner corresponding to the return of survey of the Moore.

It also appeared by plaintiff's surveyors that no original marks were ever found on the line corresponding with the south line of the Moore, as returned, nor were original corners ever found at either end of said south line.

Defendants put in evidence certain official connected maps or drafts from the land office of Pennsylvania, one bearing

date 1799, called the Broadhead map, a photographic copy of which is attached hereof and marked Exhibit L.

Also a certified connected map from the department of internal affairs of Pennsylvania of the George Moore and other warrants, a copy of which is hereto attached and made a part hereof and marked Exhibit M.

Also a certified connected map from the said department of the Henry Epple, Catharine Eck, junior, and other warrants, a copy of which is hereto annexed and made a part hereof, and marked Exhibit N.

Also a diagram prepared by defendant's counsel and proven to be accurate, showing the connection and relation of the three last-mentioned maps, a copy of which is hereto annexed and made a part hereof and marked Exhibit O.

Defendant, by its surveyors, also gave evidence tending to show that a line bearing marks dating 1792 was found from the sugar tree, the southeast corner of the Tybout tract, to the hemlock sapling corner mentioned, and that the sugar tree was marked as a corner of 1792, and that a corner of 1792 was found at the hemlock sapling corner.

The plaintiff's evidence showed the George Moore was bounded on the west from the hemlock sapling corner; south by a tract in the warrantee name of Robert Irwin, surveyed November 22, 1792, which was a part of the Broadhead lands.

Also that the hemlock northeast corner of the Moore was the northwest corner of a tract surveyed in the warrant name of Henry Betz on the 4th day of July, 1793, which tract adjoined the Moore on the east for about two thirds the length of its east line, and that the said Moore was adjoined for the remainder of the distance on its east line by a tract surveyed in the warrant name of Joseph Betz on the 4th day of July, 1793.

The returns of survey of these two Betz tracts were made April 16, 1794, with the Moore, Cooley, and Irwin.

Also that the tier of warrants east of the Betz tier of warrants was surveyed on the 19th and 20th of November, 1792,

as will appear by a plot of connected surveys made by plaintiff's surveyors and given in evidence, a copy of which is hereto annexed and marked Exhibit P.

It was testified by one of plaintiff's witnesses, one of the surveyors, that he had found no original line dividing the Moore and Cooley, the Cooley and Hardy, and the Hardy and Seeley, which was as far south as he had examined in this tier of warrants.

That southerly from the southeast corner of the Henry Betz and the southwest corner of the Samuel Temple he had found an old line run in 1798, but no original line bearing the date of survey of the tracts abutting upon it as far south as he had examined, some three miles; nor had he found any original corners for that distance southerly on that line.

That he had found no cross-lines running in an eastwardly and westwardly direction dividing the two tiers of warrants lying east of the Moore, Cooley, and Hardy, and that the said two tiers were located by lines of corners.

That so far as he had searched, he had never found any cross-lines running eastwardly and westwardly of the block including the Moore and Cooley and of the block including the Betz and Temple warrants.

But the common corners of the Cooley and Hardy lots and of the Hardy and Seeley lots in the old line of 1784 were identified by one or more of the witnesses, surveyors, and a line run and marked in 1792, forming the eastern boundary of the second tier of lots east of the George Moore, namely, Samuel Temple, Henry Bryson, Joseph Seeley, Henry Seeley, and Samuel Hardy (as shown in Exhibit P,) was followed, and identified by a surveyor employed by both parties in 1875, and who was a witness and testified thereto, and who found the corners of all of said last-mentioned lots in said line.

There was evidence tending to show that no difference could be detected in the count of a line marked November 21, 1792, and one marked July 4, 1793.

The defendant gave in evidence certain field notes of Major Flowers of surveys made for the owners of the Barclay lands in 1828, showing examination made by him of the north line of the Andrew Tybout tract; also on the south line of said tract to the hemlock sapling corner, showing that he found the line of 1798 before mentioned running south from the north line of the Andrew Tybout tract, but containing no entry that he found at the time of his examination of said lines any marks of 1792 on the north line of the Moore or on the west line north from the hemlock sapling corner.

It appeared by the evidence of the plaintiff's surveyor, Walker, that he found the letters BAR for Barclay, with the numbers of the Barclay warrants, marked by Major Flowers, at the hemlock northeast corner of the Moore and Tybout warrants, at the sugar southeast corner, and at the hemlock sapling corner.

IV. The learned Court erred in instructing the jury as follows:

"We think that an old survey like that of the Moore cannot be questioned at this late day by parties claiming under a junior title, whether that title took its origin within twenty or twenty-one years of the older survey or after that time.

The Supreme Court of this State so decided in this very case, and we think the decision was right, notwithstanding some earlier opinions which seemed to hold a different doctrine."

V. The learned Court erred in refusing to affirm the first point of the defendants below, which was as follows:

"That if the jury believe the George Moore warrant, together with the Cooley and others to the south of it, were surveyed in one block, of which the Moore was the northern member; that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corners, corresponding to what is claimed by the defendant to be the south line of the Andrew Tybout tract, the plaintiff has no title to the part of the land

north of the said south line of the Tybout tract and cannot recover provided the jury believe the Tybout tract was actually surveyed and located upon the ground as claimed by the defendant."

VI. The learned Court erred in refusing to affirm the second point of the defendant below, which was as follows:

"2. That if the jury believe that no line of 1792 was surveyed upon the ground for the Moore warrant north from the hemlock sapling corner and west from the hemlock claimed by the defendant to the northeast corner of the Tybout tract, and the line from the hemlock northeast corner aforesaid south to the sugar corner was run for warrants east of said line, and that said line was adopted by the return of survey of the Moore, such adoption will not avail to extend the Moore north of the line between the hemlock sapling and the sugar, provided the jury believe the last-mentioned line was the northern limit of the Moore block of surveys and the Tybout was surveyed and located as claimed by the defendant."

VII. The learned Court erred in refusing to affirm the third point of the defendant below, which was as follows:

"3. That as the evidence shows, the Tybout tract was surveyed March 24, 1794, within two years of the date of survey of the Moore, and as the Tybout survey was duly returned, patent issued, and claim of title asserted thereunder up to the present time, and as twenty-one years did not elapse between the Moore and Tybout surveys, the presumption that the Moore was actually surveyed as returned is not conclusive, but may be rebutted by evidence."

VIII. The learned Court erred in instructing the jury as follows:

"1. The contention of the defendant that its title to the land in dispute became established and valid as between itself and the plaintiff by the consent and acquiescence given by Jacob Dewitt, the plaintiff's agent, to the painted line made by Mr. Walker in 1866 cannot be admitted.

The assent given to that line by Jacob Dewitt was not given to it as a compromise line yielded to it for the purpose of ending a dispute or difference between the parties, for there was no such dispute or difference.

They had no knowledge that the George Moore survey, belonging to the plaintiff, interfered with the Andrew Tybout survey of the defendant's predecessors and grantors. The intimation thrown out by Mr. Walker in presence of Jacob Dewitt (if such was the fact) that there was some interference on the Tybout tract was not sufficient notice of the interference that actually existed, especially as Mr. Walker immediately added that he had put the line where he thought it ought to be and where it always had been.

No question of title had arisen between the parties, and this observation of Walker, if made at all, was not such as to awaken Dewitt's mind to the character of the conflict that actually existed between the titles."

IX. The learned Court erred in instructing the jury as follows:

"2. It cannot be conceived for a moment that if the plaintiff or his agent had known of this interference (his being the superior title) he or the agent would ever have consented to the line that was run.

If, with full knowledge of his rights, he had consented to it, it would have presented a different question.

But there is no evidence that he or his agent, or those acting for the Schraeder company, had any knowledge or notice of it whatever. It was a clear mutual mistake—one that ought not to conclude or bind the plaintiff to the loss of his land."

X. The learned Court erred in instructing the jury as follows:

"3. It is a question of error and mistake. It is not a question of consentable or compromise line at all. In our opinion there is not sufficient evidence in the case to be submitted to the jury for them to deliberate on the question whether the

painted line was a compromise line knowingly adopted by the parties so as to bind them in reference to the now acknowledged interference of the surveys.

XI. The learned Court erred in instructing the jury as follows:

"4. But, in our view, this case, in which a boundary line has been adopted by mistake, has nothing of license in it. There is no intention to give a license. The transaction has not a single element of license. It was simply a mutual mistake in the location of the line which was supposed to separate the respective lands of the parties."

XII. The learned Court erred in instructing the jury as follows:

"5. We charge you, therefore, that if the painted line was assented to by the plaintiff's agent in ignorance of the true boundaries of the plaintiff's land, and in ignorance of the interference between the Moore and Tybout surveys, then the defendant was not protected by that line from an action of trespass in taking and carrying away the timber from the plaintiff's land, and as there is no sufficient evidence to show that the plaintiff or his agent knew the true boundaries, and knew of the interference between the said surveys at the time of the cutting, you are to presume, under the circumstances of the case, that they were ignorant of the same."

XIII. The learned Court erred in refusing to affirm the defendant's fourth point, which was as follows:

"4. That if the jury believe Jacob Dewitt had charge of the Packer lands, and was authorized to protect them from depredation, and had knowledge of defendant's claim of title up to the painted line and of the painting of said line in assertion of such claim, and that said Jacob Dewitt did not object to the painting of said line, but acquiesced therein, the jury would be warranted in finding the actual possession of the disputed lands to have been in the defendant when the alleged trespasses were committed, provided they believe the evidence of the defendant as to the surveys and other acts of ownership done upon the ground by the defendant, together

with the payment of taxes; and if they do so find the actual possession to have been in the defendant, the plaintiff cannot recover."

XIV. The learned Court erred in refusing to affirm defendant's fifth point, which is as follows:

"5. That if the jury believe that Packer authorized Jacob Dewitt to establish the Tybout line as painted, or subsequently consented to such establishment, and that the same was established in good faith, the plaintiff cannot recover."

XV. The learned court erred in refusing to affirm defendant's sixth point, which was as follows:

"6. That if the jury believe Jacob Dewitt had charge of the Packer land and was authorized to protect them from depredation, and in pursuance of such charge and authority consented to the establishment of the painted line, and the defendant in good faith, relying on such consent, took the timber, the plaintiff cannot recover."

XVI. The learned court erred in refusing to affirm defendant's seventh point, which was as follows:

"That the conveyance from Packet to Dewitt took effect from November 2, 1869, for all the purposes of this case."

XVII. The learned court erred in refusing to affirm defendant's eighth point, which was as follows:

"8. That there can be no recovery in this case for timber removed from the disputed territory subsequent to November 2, 1869."

These points were declined by the court, and the court on the contrary charged the jury that the plaintiff, if entitled to recover damages at all, was entitled to recover damages for all cutting and carrying away of timber from the disputed premises up to the time that he actually sold the property to Jacob Dewitt, which, according to his testimony, was the first day of October, 1870.

WILLIAM T. DAVIES,
EDWARD OVERTON, JR.,
JOHN F. SANDERSON,
Attorneys for Plaintiff in Error.

Prayer for Reversal.

In the Supreme Court of the United States.

SCHRAEDER MINING AND MANUNACTURING COMPANY, Plaintiff in Error, Defendant below,

vs.

ELISHA A. PACKER, Defendant in Error, Plaintiff below.

To the Honorable the Justices of the said Court:

The plaintiff in error, the Schraeder Mining and Manufacturing Company, humbly complaining, showeth to this honorable court the record of this cause brought by writ of error from the circuit court of the United States for the western district of Pennsylvania, and the errors thereon assigned and manifest thereby, and thereupon prays this honorable court, on consideration thereof, to reverse the judgment appearing upon said record against your petitioner, and thereupon to make such order as to justice may belong.

And your petitioner will ever pray, &c.

WILLIAM T. DAVIES,
EDWARD OVERTON, JR.,
JOHN F. SANDERSON,
Attorneys for Plaintiff in Error.

III.

BRIEF OF ARGUMENT.

I.

The Question of Location and Title.

The facts, appearing in the bill of exceptions, are as follows:

The plaintiff below produced in evidence a warrant of survey for one George Moore of a tract of land of four hundred acres, adjoining or near lands granted on the day of the date of said warrant to Samuel Temple, in the county of Northumberland, the said warrant bearing date April 27, 1792; also return of survey on the 16th day of April, 1794, to the land office, showing a survey made pursuant to said warrant on the 21st day of November, 1792, as shown by a draft Exhibit "A."

The plaintiff then gave in evidence a patent from the Commonwealth of Pennsylvania to Samuel Wallis, bearing date February 24, 1795, for the land so surveyed, according to the description in the return of survey, in the warrant name of George Moore, and then deduced title by mesne conveyances from the said Samuel Wallis to the plaintiff, who derived his title immediately from one William H. Winder by deed dated December 17, 1864. The evidence showed that up to the date of the alleged trespasses the *locus in quo* and lands surrounding consisted of woodland, forest, or unseated land.

Plaintiff gave evidence tending to show payment of taxes on the said lands in the warrantee name of George Moore from 1812 to 1877; and gave in evidence certain official documents from the land office of Pennsylvania, as follows:

Copy of return of survey of the Robert Erwin warrant, Exhibit C.

Copy of the return of the Samuel Cooley warrant, Exhibit D.

Connected draft of returns of survey of George Moore and Robert Erwin warrants, Exhibit E.

Connected draft of seventy-three tracts of land including the George Moore, Exhibit F.

Copy of return of survey of the Henry Betz warrant, Exhibit G.

Connected draft of returns of survey of the Robert Erwin and Andrew Tybout warrants, Exhibit H, and in connection therewith called certain surveyors and gave testimony by them, the plaintiff's evidence on this subject tending to show the location of the George Moore warrant upon the ground, and tending to show that, according to such location, the defendant had committed the trespass alleged.

By the said testimony of surveyors called by the plaintiff, and by the maps and evidences of title put in evidence by the plaintiff, certain facts appeared, which are more fully referred to in connection with certain evidence given and offers of evidence made by the defendant, as hereinafter stated.

The defendant gave in evidence a warrant of survey from the Commonwealth of Pennsylvania to survey a tract of land of four hundred acres for Andrew Tybout, northeasterly and adjoining land granted to Robert Irwin, in the county of Northumberland or Luzerne, pursuant to which warrant a survey was made March 24, 1794, and subsequently returned.

The said return contained a draft of the survey which was a part thereof, Exhibit I.

Defendants then gave in evidence a patent from the Commonwealth of Pennsylvania to one Daniel Broadhead for the lands described in the said return of survey, Exhibit J.

Defendant then deduced title to the said tract of land by sundry mesne conveyances from and under said patent,

showing the said tract to have been a part of a body of land comprising about seventeen thousand acres, the title to which was for a long time, to wit, from 1795 to 1855, vested in Robert Barclay and his devisee, Charles Barclay, under whom defendant claimed, and that said lands were known as the Barclay lands, and subsequently a large portion of them, including the Tybout tract, as the Schrader lands.

The Schrader Land Company derived its title by deed dated Jan'y 3, 1866, and the Schrader Mining and Manufacturing Company derived title by deed from the trustees of the Schrader Land Company dated March 2, 1868.

Defendant also gave evidence of payment of taxes on Tybout tract from 1812 to a date subsequent to the bringing of this suit.

By the undisputed evidence it appeared that the hemlock northeast corner tree called for in the George Moore return of survey was identical with the hemlock northeast corner tree called for by the Andrew Tybout return of survey, and that the said surveys overlapped or interfered so far as their boundaries would include the same territory by running the said boundaries from the said hemlock as a common northeast corner according to their returns, the amount of said interference being about three hundred and twenty-five acres.

By like evidence it also appeared that the said hemlock was the northwest corner called for in the Henry Betz return of survey, and that the Henry Betz survey adjoined with the George Moore and Andrew Tybout surveys on the east, separated therefrom by an old line marked as early as 1784, and re-marked in 1792, and subsequent years, and extending several miles southerly.

Evidence was given by defendant showing that original marks were found on certain trees on the north, east, and south lines of the Tybout survey, which counted to the date of that survey, and that the hemlock northeast corner, the sugar southeast corner, and the hemlock sapling southwest corner called for in the return were marked respectively as corners in 1794.

The hemlock sapling had disappeared, but the age of the corner was determined by the defendant's surveyor by a witness found thereat and other signs.

The defendant alleged that the plaintiff's tract was never actually surveyed upon the ground north of the line from the hemlock sapling to the sugar corners corresponding to the south line of the Tybout survey, and in support of its allegation relied upon the following evidence which appeared in the cause:

As a part of his claim of title, the plaintiff put in evidence a deed tripartite dated October 25, 1805, between Joseph Priestly and wife, of the first part, John Vaughan, of the second part, and Thomas Fitzsimmons, John Miller, Jr., and Robert Bird, trustees for certain creditors of John Vaughan, of the third part, which recited that—

"For as much as divers inaccuracies have been discovered in the original surveys made of several of the tracts which in the division aforesaid fell to the lot of them, the said Thomas Fitzsimmons, John Miller, Jr., and Robert Bird, trustees aforesaid, the same have therefore since been resurveyed and are now more accurately designated in the annexed draft thereof, representing each tract as it is actually surveyed and marked upon the ground, (mentioning subsequently, *inter alia*, the George Moore warrant, and giving also its fancy name of Greenfield;) all which tracts are distinguished and marked on the annexed plan by numbers corresponding with those above enumerated, and are represented and described by the annexed plan of the resurvey thereof as actually resurveyed and marked on the ground as aforesaid," and to which was attached a certain map referred to therein, which map was also given in evidence by the plaintiff.

A full copy of the said tripartite deed is annexed to the bill of exceptions, Exhibit K.

The width of the George Moore warrant, as shown by this map, was 200 rods, which corresponds with the distance laid down in the return of survey, but the calls in the return for

General Broadhead's lands gives the Moore survey an additional width of about thirty rods.

The said map showed the George Moore lot in the same position as in the survey thereof with regard to the surrounding lots of Henry Betz, Joseph Betz, and Samuel Cooley.

It was also shown by the plaintiffs' surveyors, or one of them, that beginning on the north line of the Moore survey, as located on the ground by its return, at a point two hundred rods westerly from the hemlock northeast corner, a line extended from a corner marked in 1798 nearly parallel with the east line of the Moore tract, and also nearly parallel with such east line projected southerly, which was run in 1798, for about three miles and sixty-four rods, where it ended, and an offset was thence made to the west to an undisputed line of 1792, bounding the Broadhead or Barclay lands on the east, the plaintiff's surveyor testifying that the said line of 1798 was evidently a trial line. Said Broadhead line ran about thirty rods distant from and nearly parallel with said line of 1798, and extended from the hemlock sapling corner before mentioned, a distance of five or six miles southerly.

Plaintiff's evidence also showed a general survey of 1798 to have been marked on a number of the tracts mentioned in said deed of 1805.

The map attached to said deed in laying down the George Moore survey thereon and other surveys south of the same, laid them down as 200 perches in width, being the width called for in the official surveys and being about thirty perches less in width than the actual distance to the old line of the Broadhead lands called for in said surveys, and it was claimed by the defendant that the map thus showed the George Moore warrant was bounded on said map by the line of 1798 aforesaid. No other general survey of the lands mentioned in said deed of 1805 was made between the dates of the warrants and the date of the deed of 1805.

It was shown by one of plaintiff's surveyors that in 1860 he made a survey of the Barclay lands for the owners, he

having then in his possession the field notes of his grandfather, one Major Zephon Flowers, whose work has been found, dating as early as 1795, and who surveyed and mapped the Barclay lands for their owners in 1828.

That on said survey of 1860 the said surveyor, one Z. F. Walker, found the corner of 1798 at the north end of the line of 1798, and also followed the said line of 1798 either then or in 1866 to its end.

That in 1860 he searched northerly from the hemlock sapling corner for a line of 1792, but found none.

That he surveyed the said lands in 1866 for their owners and afterwards in 1880 for the plaintiff, but on neither survey did he find any marks of 1792 north from the hemlock sapling corner (no timber being left north of Schrader creek on this line after 1867 or 1868) nor west from the hemlock northeast corner corresponding to the return of survey of the Moore.

It also appeared by plaintiff's surveyors that no original marks were ever found on the line corresponding with the south line of the Moore as returned nor were original corners ever found at either end of said south line.

Defendants put in evidence certain official connected maps or drafts from the land office of Pennsylvania, one bearing date 1799, called the Broadhead map, a photographic copy of which is Exhibit L; also a certified connected map from the Department of Internal Affairs of Pennsylvania of the George Moore and other warrants, Exhibit M; also a certified connected map from the said department of the Henry Epple, Catharine Eck, junior, and other warrants, Exhibit N; also a diagram prepared by the defendant's counsel and proven to be accurate, showing the connection and relation of the three last-mentioned maps, Exhibit O.

Defendant, by its surveyors, also gave evidence tending to show that a line bearing marks dating 1792 was found from the sugar-tree, the southeast corner of the Tybout tract, to the hemlock sapling corner mentioned, and that the sugar-

tree was marked as a corner of 1792, and that a corner of 1792 was found at the hemlock sapling corner. The plaintiff's evidence showed the George Moore was bounded on the west from the hemlock sapling corner, south by a tract in the warratee name of Robert Irvin, surveyed Nov. 22, 1792, which was a part of the Broadhead lands; also that the hemlock northeast corner of the Moore was the northwest corner of a tract surveyed in the warrant name of Henry Betz on the 4th day of July, 1793, which tract adjoined the Moore on the east for about two thirds the length of its east line and that the said Moore was adjoined for the remainder of the distance on its east line by a tract surveyed in the warrant name of Joseph Betz on the 4th day of July, 1793. The returns of survey of these two Betz tracts were made April 16th, 1794, with the Moore, Cooley, and Irwin; also that the tier of warrants east of Betz tier of warrants was surveyed on the 19th and 20th of November, 1792, as will appear by a plat of connected surveys made by plaintiff's surveyors and given in evidence, a copy of which is hereto annexed and marked Exhibit P.

It was testified by one of plaintiff's witnesses, one of the surveyors, that he had found no original line dividing the Moore and Cooley, the Cooley and Hardy, and the Hardy and Seeley, which was as far south as he had examined in this tier of warrants; that southerly from the southeast corner of the Henry Betz and the southwest corner of the Samuel Temple he had found an old line run in 1798, but no original line bearing the date of survey of the tracts abutting upon it as far south as he had examined, some three miles, nor had he found any original corners for that distance southerly on that line; that he had found no cross-lines, running in an eastwardly and westwardly direction, dividing the two tiers of warrants lying east of the Moore, Cooley, and Hardy, and that the said two tiers were located by lines of corners; that, so far as he had searched, he had never found any cross-lines running eastwardly and west-

wardly of the block including the Moore and Cooley and of the block including the Betz and Temple warrants; but the common corners of the Cooley and Hardy lots and the Hardy and Seeley lots in the old line of 1784 were identified by one or more of the witnesses, surveyors, and a line run and marked in 1792, forming the eastern boundary of the second tier of lots east of the George Moore, namely, Samuel Temple, Henry Bryson, Joseph Seeley, Henry Seeley, and Samuel Hardy, (as shown in Exhibit P,) was followed and identified by a surveyor employed by both parties in 1875, and who was a witness, and testified thereto, and who found the corners of all of said last-mentioned lots in said line.

There was evidence tending to show that no difference could be detected in the count of a line marked November 21, 1792, and one marked July 4, 1793.

The defendant gave in evidence certain field-notes of Major Flowers of surveys made for the owners of the Barclay lands in 1828, showing examinations made by him of the north line of the Andrew Tybout tract; also on the south line of said tract to the hemlock sapling corner, showing that he found the line of 1798, before mentioned, running south from the north line of the Andrew Tybout tract, but containing no entry that he found at the time of his examination of said lines any marks of 1792 on the north line of the Moore or on the west line north from the hemlock sapling corner.

It appeared by the evidence of the plaintiff's surveyor, Walker, that he found the letters B A R for Barclay, with the numbers of the Barclay warrants, marked by Major Flowers at the hemlock northeast corner of the Moore and Tybout warrants, at the sugar southeast corner, and at the hemlock sapling corner.

In connection with this evidence the defendant offered to give further evidence, founded on examinations made on the ground by surveyors in connection with the maps and other documents already in evidence, to show that the Moore war-

rant was not actually surveyed on the ground according to its return of survey, but that it was surveyed, together with the Cooley and other warrants to the south of it, in one block, of which the Moore was the northern member; that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corners, corresponding to what was claimed by the defendant to be the south line of the Andrew Tybout tract; that no line of 1792 was surveyed on the ground for the Moore warrant north from the hemlock sapling corner, nor west from the hemlock northeast corner of the Tybout tract; that the line south from the hemlock northeast corner aforesaid was run for warrants to the east of said line, and was adopted merely by the return of the Moore.

To this evidence the plaintiff objected on the ground that twenty-one years and upwards having elapsed from the date of the Moore survey there was a presumption *juris et de jure* that the said survey was made as returned, and the evidence was, therefore, inadmissable.

The court sustained this objection and excluded the evidence so offered, and thereupon the defendant excepted to the ruling and to the exclusion of the evidence.

Whereupon the defendant did then and there except to the said refusal of the court to charge as so requested, and the court did then and there, at the request of the defendant, note a bill of exceptions upon each of the said points severally, and now signs the same.

The said portions of the charge and the said points so excepted to are as follows:

As to the plaintiff's title under the George Moore warrant the court charged the jury:

"We think that an old survey like that of the Moore cannot be questioned at this late day by any parties claiming under a junior title, whether that title took its origin within twenty or twenty-one years of the older survey or after that time.

"The Supreme Court of this State so decided in this very

case, and we think that the decision was right, notwithstanding some earlier opinions which seem to hold a different doctrine."

Upon this subject the defendant's points were as follows:

1. That if the jury believe the George Moore warrant, together with the Cooley and others to the south of it, were surveyed in one block, of which the Moore was the northern member; that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corner corresponding to what is claimed by the defendant to be the south line of the Andrew Tybout tract, the plaintiff has no title to the part of the land north of the said south line of the Tybout tract and cannot recover, provided the jury believe the Tybout tract was actually surveyed and located upon the ground, as claimed by the defendant.

2. That if the jury believe that no line of 1792 was surveyed upon the ground for the Moore warrant north from the hemlock sapling corner and west from the hemlock, claimed by the defendant to be the northeast corner of the Tybout tract, and that the line from the hemlock, northeast corner aforesaid, south to the sugar corner, was run for warrants east of said line, and that said line was adopted by the return of survey of the Moore, such adoption will not avail to extend the Moore north of the line between the hemlock sapling and the sugar, provided the jury believe the last-mentioned line was the northern limit of the Moore block of surveys and the Tybout was surveyed and located as claimed by the defendant.

3. That, as the evidence shows, the Tybout tract was surveyed March 24, 1794, within two years of the date of survey of the Moore, and as the Tybout survey was duly returned, patent issued, and claim of title asserted thereunder up to the present time, and as twenty-one years did not elapse between the Moore and the Tybout surveys, the presumption that the Moore was actually surveyed as returned is not conclusive, but may be rebutted by evidence.

The theory of the defendant is based upon the following settled propositions of Pennsylvania land law:

1. That the warrant and survey are the origin of title, and the patent only the confirmation of it; hence, if the patent embrace more land than is surveyed it is void for the excess, and does not pass the title of the Commonwealth thereto as against a subsequent warrantee.

Delaware & Hudson Canal Co. vs. *Dimock, 47 Penn. St. Rep., 393.*

2. That courses, calls, and distances, must give way to marks on the ground, and these marks control both survey and patent.

Watson vs. *Jones, 85 Penn. St. Rep., 157.*

And this is true even where the return of the surveyor calls for a natural or fixed boundary.

Walker vs. *Smith, 2 Penn. St. Rep., 432.*

Burkholder vs. *Markley, 98 Penn. St. Rep.*

Manhattan Coal Co. vs. *Smith, 73 Penn. St. Rep.*

And see *Clement* vs. *Packer, 125 U. S., 309.*

3. A chamber survey is not *ipso facto* a void act. If it be by the adoption of the lines of older surveys, made under authority of law, to the extent that is necessary to make a good survey on the ground, it is as valid as though done by running and marking the lines afresh. But if the fact be made to appear that the survey was fitted only to a single line of an older survey, leaving the other lines unmade in a figure of four or more sides, and the survey is finished merely by protraction on paper, it is invalid against a junior survey made within twenty-one years. It is no better than the running of one line and then leaving the survey incomplete.

Glass vs. *Gilbert, 58 Penn. St. Rep., 266, 291.*

3. That the rule above stated, viz: that where there is a discrepency between lines run and marked upon the ground and calls for older surveys and natural monuments, the latter must give way, and the lines and courses themselves must

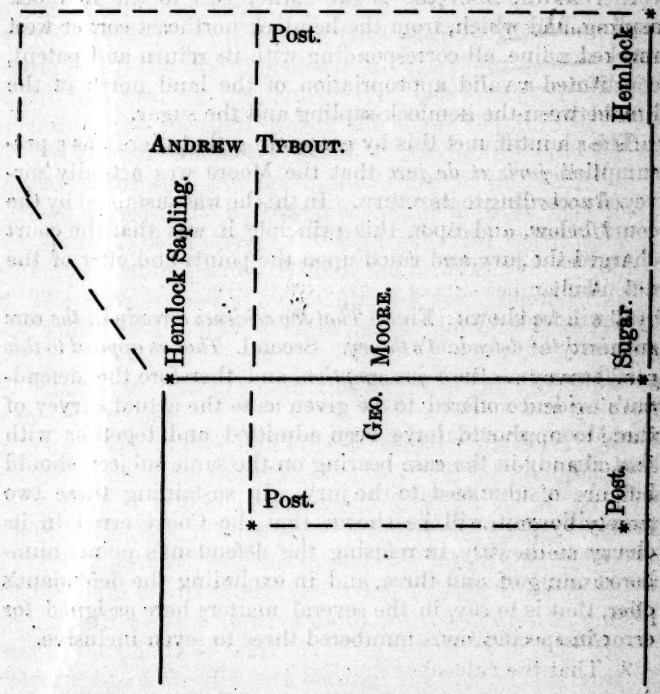
govern the location, is equally applicable to individual surveys and to blocks of surveys.

Pruner vs. *Brisbin*, *98 Penn. St. Rep.*, *202*, *209*, *213*.

4. And that a block must be surrounded by an exterior line as complete as would make a good survey if the entire body of land were contained in a single warrant.

Glass vs. *Gilbert*, *58 Penn. St. Rep.*, *266*, *292*.

This theory, applied to the facts of the present case, stated in briefest form, is as follows:



That the surveyor who located the Moore warrant terminated his work on the ground after running the line from the south up to the hemlock sapling and across to the sugar,

there connecting with a line run for warrants on the east. That he ran no line from the hemlock west, nor from the hemlock sapling north; that in returning the survey, he adopted the hemlock northeast corner and the line from it south, and thus laid the warrant down upon land three fourths of which he has not surveyed, and to which, therefore, no title was created in the warrantee as against a junior survey made within twenty-one years; and that the survey of the Tybout, which also adopted the line from the hemlock corner south, from the sugar corner east to the hemlock sapling, and which, from the hemlock northeast corner west marked a line, all corresponding with its return and patent, constituted a valid appropriation of the land north of the line between the hemlock sapling and the sugar.

The plaintiff met this by contending that there was a presumption *juris et de jure* that the Moore was actually surveyed according to its return. In this he was sustained by the court below, and upon this principle it was that the court charged the jury and ruled upon the points and offer of the defendant.

It will be shown: First. *That the evidence already in the case sustained the defendant's theory.* Second. *That as applied to this case there was no such presumption,* and therefore the defendant's evidence offered to be given as to the actual survey of the Moore should have been admitted and, together with that already in the case bearing on the same subject, should have been submitted to the jury. In sustaining these two propositions it will be shown that the Court erred in its charge to the jury, in refusing the defendant's points numbered one, two, and three, and in excluding the defendant's offer, that is to say, in the several matters here assigned for error in specifications numbered three to seven inclusive.

1.

THE EVIDENCE SUSTAINED THE DEFENDANT'S THEORY.

As shown by the bill of exceptions and the exhibits thereto annexed, and constituting part thereof:

1. No line was ever found bearing the date of 1792, from the hemlock northeast corner west, corresponding with the north line of the Moore as returned.

2. No line was ever found, bearing the date of 1792, from the hemlock sapling north.

3. No line bearing the date of 1792 was ever found corresponding with the west line of the Moore as returned.

4. No line, bearing the date of 1792, was ever found corresponding with the south line of the Moore as returned.

5. No corners were ever found corresponding with the southeast, southwest, and northwest corners of the Moore as returned, nor with the northwest corner, if it is assumed to be at the point of intersection of lines extended north from the hemlock sapling and west from the hemlock.

6. The three corners above mentioned are designated as posts, which in a survey of forest lands indicates chamber work.

7. The waters laid down on the return of the Moore are not in proper place.

8. The Moore, Cooley and other warrants to the court were surveyed at the same time, (Exhibit M.) On the Broadhead line (Exhibit L) a number of corners to which no warrants are laid are marked in such position that if the warrants east were laid lengthwise from east to west they would appropriate the land south of the south line of the Tybout, without interfering, either at the north or south, with other surveys, and corner at the points so marked. The inference is that the surveyor mistook the distance between the tier of warrants in the name of Betz and Fritz (Exhibit F. O.) and the Broadhead line, and did his work on the ground so as to lay the Moore and others lengthwise from east to west, but finding

his lines too short by one hundred rods, laid them the other way, (Exhibit O.)

9. This accounts for the line of 1792 from the hemlock sapling to the sugar, for the fact that these are corners of 1792, for the absence of the north line of the Moore and the west line north of the sapling, for the inaccuracy in laying down the water on the return, for its official width being less than its call, for the three post corners and for all the other circumstances tending to show want of actual survey north of the south line of the Tybout.

10. In 1798, the owners of the Moore were unable to find the west line of the warrant. This is shown by the line of that date run south from the official north west corner of the Moore. The evidence showed marks of a general survey of lands belonging to the owners of the Moore at this time.

11. The deed tripartite of 1805 recites that divers inaccuracies have been found in the surveys of the lands included within it, and that an actual survey has been made of them, and it has attached a map laying the Moore down to the line of 1798.

12. In 1828 Major Zephon Flowers, a surveyor whose work has been found dating to 1795, (he was the grandfather of one of the plaintiff's witnesses, also a surveyor, who had Major Flowers' field notes in his possession,) made a survey of the Barclay lands. He found the line of 1798, but no marks of 1792 on the line running west from the hemlock, nor any line north from the hemlock sapling. He accordingly cut B. A. R., for Barclay, on the hemlock northeast corner, on the sugar southwest corner, and on the hemlock sapling southwest corner of the Tybout.

13. In 1860 and 1866, before any cutting was done, the plaintiff's witness Walker made careful surveys of the Schraeder lands, and searched where he would have found the north and west lines of the Moore if any existed, but he found no marks save those of 1798.

These are some of the propositions excluded from the con-

sideration of the jury which are shown by the evidence embraced in the bill of exceptions and which are relied on by the defendant as showing the correctness of the theory that the north line of the Moore, as actually surveyed and marked upon the ground, was run from the hemlock sapling to the sugar, and that no work was ever done north of that line in the survey of the Moore warrant.

2.

THERE IS NO PRESUMPTION *juris et de jure* THAT THE MOORE WARRANT WAS ACTUALLY SURVEYED AS RETURNED.

This point has already been so decided by this court.

In *Clement* vs. *Packer*, *125 U. S., 309, 336*, it was said:

The learned counsel for the defendant in error argue with great force and ingenuity that the rule is firmly established as the law of Pennsylvania, that after a survey has been returned into the land office for the period of twenty-one years unchallenged by any adverse claimants in the mode required by law, it is a conclusive presumption that the survey was actually made and marked upon the ground as shown by the official return. After a careful examination of the decisions of the Supreme Court cited by counsel, and some others relating to the subject, we are convinced that they are all in harmony with the conclusions herein announced. After the lapse of twenty-one years from the return of a survey, the presumption is that the warrant was located as returned by the surveyor to the land office; and in the absence of rebutting facts, the official courses and distances determine the location of the tract warranted. But this presumption is not conclusive, and is rebutted by proof of the existence of marked lines and monuments, and other facts tending to show that the actual location on the ground was different from the official courses and distances.

The last case on this subject in the Supreme Court of Pennsylvania is *Packer* vs. *Schraeder Mining and Manufacturing Company, 97 Penn. St. Rep., 379;* the report of the reversal of a judgment obtained in the court of common pleas of Bradford county, in favor of the defendant in this case upon its first trial in that court.

The opinion in that case does declare that there is such a presumption as that contended for by the plaintiff below. But there was no such question before the court. No such question had been mooted between the parties. On the contrary, the law was conceded, and correctly conceded, by counsel for Packer, to be the other way. This appears in the points, submitted by him on that trial, which were before the Supreme Court of Pennsylvania on the writ of error, and which were then part of the record in the case. These points, and the answers thereto in the court below, were as follows:

1st. The Court is respectfully requested to charge the jury. The return of the survey of the George Moore warrant, as is shown by the evidence in this case, establishes, *prima facie*, that the said tract was located by a survey upon the ground as set forth in said return, and the burden of proof is upon the defendants to show to the contrary.

2nd. That if the jury find from the evidence that the Schraeder creek located upon the ground across the west line of the George Moore, as indicated in the return of survey, this is strong evidence of an actual survey.

3rd. That slight marks upon the ground indicating an actual survey, should after the lapse of eighty-seven years, have great weight in repelling the charge of a chamber survey.

4th. That in order for the jury to determine that the George Moore was actually run upon the ground as is shown by the return of survey, it is not necessary at this date, after a lapse of eighty-seven years, after the destruction of most of the timber by fire and the hand of man, that the marks of a survey of 1792 should be found on more that one of the lines.

1. Affirmed.

2. Affirmed also, if the jury find that the Schraeder creek crossed the western boundary where the official map shows it crossed. If it does not, it is some evidence tending to show there was no survey in fact of that line in 1792.

3. Affirmed, if such marks are original marks.

4. Affirmed.

In order to exhibit fully what was litigated in the Supreme Court of Pennsylvania in *Packer* vs. *Schraeder*, the whole paper-book of the plaintiff in error in that case is printed as an appendix hereto, omitting only the maps and stenographer's notes of testimony on the trial.

The true rule in Pennsylvania was well settled prior to *Packer* vs. *Schraeder*. It was:

That where a survey has been returned upwards of twenty-one years before the date of a junior survey, the question as between the older and younger surveys is one of location merely, and there is a presumption in favor of the older survey *juris et de jure* that it was surveyed as returned. But there was no such absolute presumption where, as in this case, the junior survey was made within twenty-one years. Here less than two years had elapsed between the surveys.

The error of the Supreme Court of Pennsylvania was in overlooking the fact that the junior survey had been made within twenty-one years.

This point was expressly ruled in *Schnable* vs. *Doty*, *3 Barr*, *392*, *396*, *397*, in these words:

After a survey has been returned more than twenty-one years the presumption that it has been legally made is conclusive, and cannot be contradicted; but as less than twenty-one years transpired between the return of defendant's survey and the warrant, survey and patent under which the plaintiff claims, the Court instruct you that the return of defendant's survey is strong presumptive evidence that a survey was made, as stated in the return, but not conclusive in favor of such survey.

This was the answer of the Court below to a point submitted by defendant's counsel, in which a conclusive presumption was set up.

The point and answer are set forth in full, and the ruling is affirmed in the opinion of the Supreme Court of Pennsylvania, delivered by Judge Burnside, one of the oldest and ablest of the land lawyers of that State. In that case, de-

fendant's title was based on an improvement made in 1804, survey in 1814, on warrant dated in that year, (see p. 392;) and the plaintiff's title was based on a warrant of 1793, and survey of 1794. The doctrine of earlier cases, affirming a conclusive presumption, is recognized in this case, and the cases are referred to, viz: *Mock* vs. *Astley*, *Caul* vs. *Spring*, *Lambourn* vs. *Hartswick*. But these are shown to be inapplicable, because sufficient time had not elapsed between the inceptions of the titles to admit the presumption contended for.

The Pennsylvania cases in which the presumption has been applied are stated in the foot note.* The citation in-

*In *Morris* vs. *Travis*, *7 Sergt. & R., 220*, the plaintiff below failed to recover on a warrant and survey, and the judgment was affirmed. The nature of the defendant's title seems to have been an improvement. It is suggested in this case that a single line may be evidence of a survey, and may go to the jury together with possession, &c., which, after twenty-one years, will raise a legal presumption in favor of the regularity of a survey.

In *Lambourn* vs. *Hartswick*, *13 Sergt. & R., 113*, the judgment was reversed solely upon the ground of error in the rejection of a deposition. (See p. 124.) The defendants had judgment below. The plaintiff claimed on warrant of 1801 and survey of 1802, patented 1816; defendant on warrant and survey of 1784. The questions presented on the surveys were two, (see p. 122,) neither of which related to the presumption in question, which is suggested in like manner and in the same connection as in *Morris* vs. *Travis*.

In *Mock* vs. *Astley*, *13 Sergt. & R., 382*, plaintiffs claimed on warrant and survey against defendants, who showed an occupation merely. The time elapsed between plaintiff's warrant and survey, and the origin of defendant's possession does not appear. The question was whether defendant's possession was within plaintiff's lines. The plaintiffs failed and the judgment was reversed.

The presumption *omnia*, &c., as applied to the return is referred to, and the Court says, "where the return has lain for years in the

cludes the cases of *Ormsby* vs. *Ihmsen*, *Lambourn* vs. *Hartswick*, *Mock* vs. *Astley*, and *Norris* vs. *Hamilton*, which are referred to in the opinion of the Supreme Court of Pennsylvania in *Packer* vs. *Schraeder*, and it will be seen that these cases do not support the doctrine of that opinion, but, on the contrary, are in harmony with the contention here maintained. The late case of *Glass* vs. *Gilbert*, *8 Smith, 266, 291*, clearly states the distinction:

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office undisturbed, *without any opposing claim or possession*, more particularly where the owner has paid the public taxes, the presumption is a violent one, and so ought always to be left to the jury, of the survey being a regular one, though all the marked trees are not, at a distant day, to be found on the ground; and after twenty-one years, by analogy to all presumptions, for myself, and as my own opinion, I would consider it as a presumption of law, and, like livery of seisin, it ought to be presumed.

In *Caul* vs. *Spring*, *2 Watts, 390*, plaintiffs warrant was of 1793 and survey of 1794, defendants warrant of 1814 and survey of 1815, the plaintiff showed older surveys around three sides of his warrant, and this was held good, and the jury instructed to render a verdict in his favor. (P. 391.) Judgment on this was affirmed. In the opinion of the Supreme Court, the diction in *Mock* vs. *Astley*, above quoted, is heartily approved, but it is said to be unnecessary to decide that there is such a presumption, *juris et de jure*.

In *Martz* vs. *Hartley*, *4 Watts, 262*, plaintiff showed warrants on surveys of 1772, the owners of which recognized a common boundary line. In 1833 a supposed vacant strip of five acres was taken up between them, contrary to this recognition, the presumption was applied.

In *Norris* vs. *Hamilton*, *7 Watts, 91*, plaintiff claimed under warrants of 1794, surveys of 1795, defendant under defective warrants and surveys of 1793, re-surveyed, so as to include part of plaintiff's land, in 1817 or 1818, (see p. 96.) The presumption was applied.

In *Nieman* vs. *Ward*, *1 W. & S., 68*, defendant relied on warrants and surveys of 1774, located by adjoiners, plaintiff claimed

If the fact be made to appear that the survey was fitted only to a single line of an older survey, leaving the other lines unmade in figures of four or more lines, and the survey is merely finished by protraction on paper, it is invalid against a junior survey made within twenty-one years. It is no better than the running of one line and then leaving the survey incomplete. But if twenty-one years elapse before the interference of a junior survey the presumption in favor of the first survey becomes absolute, even in the case of a chamber survey, pp. 291, 292.

This was an important case, elaborately argued and fully considered. The opinion of the Supreme Court of Pennsylvania was delivered by Chief Justice Agnew, himself a writer upon the land laws of Pennsylvania.

The objections to *Packer* vs. *Schraeder* as an authority here may therefore be thus summarized:

1. The doctrine declared therein was not upon a point there litigated or argued, but in opposition to the explicit concession of the party in whose favor it was declared.

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on warrant of 1837. The presumption was applied in defendant's favor.

In *Ormsby* vs. *Ihmsen*, *10 Casey*, *462*, plaintiff claimed on warrant and survey of 1786, defendant on warrant and survey of 1837. The presumption was applied.

In *Bellas* vs. *Cleaver*, *4 Wright*, *260*, the presumption was applied in opposition to the claim of a chamber survey to go beyond its official lines to the lines of *junior* surveys *which called for it.*

In *McBarron* vs. *Gilbert*, *6 Wright*, *268*, plaintiff claimed under warrants of 1784, surveys of 1787, defendants under warrants and surveys of 1815. They also showed warrants and surveys of 1794, but deduced no title from the latter. It was said to be unavailable to them to show that the latter "might possibly at some former day" have resisted the plaintiff's title, especially as claim thereunder had been totally neglected.

In *Dreer* vs. *Carskaddon*, *12 Wright*, *88*, plaintiff claimed under warrant of 1794, survey of 1795; defendant under warrants of 1831 and 1859. The presumption was applied.

In *Collins* vs. *Barclay*, *7 Barr*, *67*, *74*, the presumption is applied against an intruder.

2. The doctrine is not supported by the cases referred to in the opinion.

3. It opposes earlier and well-considered cases in which the question was argued, fully considered, and directly ruled in opposition thereto.

4. These cases are not therein referred to or considered.

5. The doctrine is directly opposed to *Packer* vs. *Clement*, *125 U. S., 309*, where the very point was in question and directly ruled.

If the Moore was a chamber survey, there was nothing on the ground to indicate an appropriation of the land. The survey of the Tybout constituted a valid appropriation. The title vested in the Tybout warrantee. The Moore survey as against such warrantee was void. So, therefore, the title stood on the 24th of March, 1794. The valid legal title thus vested in the Tybout warrantee drew to itself the legal possession of the forest land embraced in the survey. When, therefore, did any limitation begin to run against such title and possession? How could the owners thereof, within twenty-one years from 1794, protect themselves against the operation of an artificial presumption first declared as the law of Pennsylvania in 1881, and which by the law as expressly declared previous to that time, notably in 1846 and 1868, had never previously existed? If the Legislature cannot by limitation laws compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims. (*Cooley, Const. Lim., 5 ed., p. 450,*) Does it consist with reason that an arbitrary rule of evidence shall compel such action on pain of forfeiture of the estate possessed?

II.

The Question of Possession.

In 1798, the owners of the Moore and other warrants adjoining the Broadhead or Barclay land, surveyed and afterwards mapped their lands per map attached to deed of 1805, (Exhibit K, Transcript, p. 44,) showing them as bounded by a line giving the Moore and other warrants southerly the official width of 200 rods. (Transcript, pp. 28, 29.) This width was about thirty rods less than their call for Gen. Broadhead's lands, and there was a strip, therefore, of about this width, upwards of three miles in length, between the 1798 line, and the Broadhead line from the hemlock sapling southerly.

In 1828, Major Flowers examined the lines of the Tybout, found the line of 1798, but, it is claimed, no other line of the Moore within the limits of the Tybout survey, and he distinctly marked the hemlock northeast corner, the sugar southeast corner, and the hemlock southwest corner with B. A. R., for Barclay, and the numbers of the Barclay warrants cornering at these points. This was done for the Barclays and was an act unequivocal in character in assertion of their title. (Transcript, pp. 30, 31.)

In 1866, the defendant, then the owner of the Barclay lands, was about erecting a mill for the purpose of carrying on extensive lumbering operations. To avoid trespassing, the lines of its lands were surveyed, distinctly marked, and the blaze marks painted white. The line between the Schraeder lands and the Packer lands was thus painted with the full knowledge of Packer's duly and fully authorized agent, by a surveyor whose choice by the Schraeder Company was assented to by such agent. The surveyor informed the agent of an interference on the Tybout, and added that he had put the line where it had always had been and where he thought it ought to be. The agent went with the Executive Committee of the defendant on the painted line on the

Tybout tract. He stated to the committee that he was satisfied the interest he represented would be protected by the painted line; that he would thereby come into possession of the thirty rod strip, running two or three miles, adjoining the Schraeder lands, and that defendants might go on and build their mill and cut up to the painted line. (Transcript, pp. 32, 33.) Subsequently, in 1869, after most of the cutting had been done, the same agent, in company with a representative of the defendant, went upon the lands to see if any trespass had been done by defendant upon plaintiff. He found no cutting beyond the painted line, and expressed himself as satisfied. (Transcript, p. 33.)

Upon these facts, more fully stated in the bill of exceptions and Statement of Facts herein, and upon the charge of the court, and answers to defendants points thereon, (Transcript, pp. 40–41. Specifications of Error, eight to fifteen inclusive, (Transcript, pp. 57, 58, 59,) the following may be fairly formulated as the questions presented:

1. Since it appears that Dewitt, the agent of Packer, knew there was an interference on the Tybout tract, and of the question as to the strip between the line of 1798 and the Broadhead line, and that by the painted line, the strip was given to Packer and the interference to the Schreader Company, and that he consented to the establishment of such line as the authorized agent of Packer, does not such consent bind the title?

2. If it does not bind the title, does it not, in connection with the acquiesence in the acts done upon the land by the Schraeder Company, operate on the possession so as to oust Packer and bar trespass?

3. Does it not amount to a license?

4. Or, in view of all the facts, does it not amount to an estoppel?

5. Is it presumed, as a matter of law, in the absence of affirmative evidence, that a party is ignorant of the true boundaries of his own land?

6. Was there not sufficient evidence upon this question to submit to the jury?

7. Is it not presumed that a party does know his own boundaries?

8. When one who is about to cut timber applies to his neighbor, for the expressed purpose of avoiding a trespass, to join in running a division line, which is accordingly done, is not such party protected from an action of trespass even though there be a mutual mistake as to the line run?

9. And is not this especially true where leave is expressly given to cut to such division line?

The owner of warrant 4881 sold it, but by mistake pointed out to his vendee 4880, an adjoining warrant on the north, as being the land sold. The vendor afterwards, as agent, bought for another person 4884, which adjoined on the south. The vendee of 4884 sold it out in lots, and by the same mistake pointed them out as being 4881; improvements were afterwards made on some of these lots. *Held* that the original vendor of 4881 and his vendee were estopped from claiming the true 4881, both as to the parts improved and those unimproved.

Milligar vs. *Sorg*, *5 P. F. Smith, 215.*

Id., 11 Smith, 471.

But the defendant gave evidence of the establishment of a consentable line, as a permanent boundary, which he contended was fixed by him and *Jackson*, under whom the plaintiff claims. This boundary leaves the land to the defendant. Whether the parties ever agreed to it, and if they did, under what circumstances, were matters proper for the decision of the jury; what we have to do with is the direction of the Court in matters of law. It was laid down in general terms, that if, at the time of an agreement to establish a consentable line, as we technically call it, the parties labor under a mistake as to their respective rights, they will not be bound. To this doctrine I do not assent; no boundary of the sort could in any case prevail, if it were law, for the

consideration of the agreement is, ninety-nine cases out of a hundred, the settlement of a dispute arising from ignorance and misapprehension of right on both sides.

Perkins vs. *Gay, 3 S. & R., 327, 331.*

It is no question, it cannot be made a question, but that consentable lines, settlement of boundaries, and holding by them, would, unless there was some fraud practiced, and an advantage taken of the ignorance of one party, the other being conversant of the real lines, be conclusive between persons competent to bind the rights. So I would hold, that a fair settlement, so made, by guardian, and acquiesced in by the infant holding possession after he came of age, would amount to a confirmation.

These settlements of boundaries are common, beneficial, approved and encouraged by the courts, and ought not to be disturbed, though it was afterwards shown that they had been erroneously settled, if they have been acquiesced in for a number of years.

Brown vs. *Caldwell, 10 S. & R., 115.*

Where one encourages another to enter upon land and invest money or expend labor, assuring him he will thereby acquire title, he cannot call in question such title even though he acted in ignorance of his own right.

Woodward vs. *Tudor, 32 Smith, 382.*

When by consent of the owners a line is run, such consent is a mutual license to both parties to treat the line as the true boundary.

Palmer vs. *Anderson, 63 N. C., 365.*

Where an act is done with the express or implied sanction of the owner of real estate, it shall not be treated as a tort, nor made the foundation of recovery in damages.

Den. Richman vs. *Baldwin, 1 Zab., 404.*

It does not follow that because a license is void for the purpose of carrying title, it may not enure as a personal authority, and until revoked protect the defendant from an action for a wrong.

Miller vs. *Auburn R. R. Co., 6 Hill, 64.*

Good faith requires that the owner of lands should not treat acts done under his authority, or with his express or implied sanction, as wrongful, or make them a foundation of recovery in damages, * * * and no citation of authority is necessary to show that a man cannot authorize another to enter upon or walk over his land and then sue him in trespass for taking advantage of his permission.

2 Am. Lead. Cases, 564.

III.

The Question Relating to the Termination of Plaintiff's Title.

This question is presented by the sixteenth and seventeenth specifications of error, (Transcript, p. 59,) and upon the facts stated in the bill of exceptions, (Transcript, pp. 26, 33, 51,) from which it appears that Packer conveyed his title in the *locus in quo* to one Jacob DeWitt, by deed executed and delivered him Nov. 2, 1869, upon a separate written agreement of DeWitt that the title should not pass until a certain condition was complied with, which was performed in Oct., 1870, and consisted in the payment of certain money. The agreement provided that on the performance of the condition the deed should be of full force and virtue.

It is contended that what Packer said as to when he sold the land cannot control the legal construction and effect of the deed and agreement taken together.

That this construction and effect should be to make the deed operative from its delivery, consistently with the nature of the transaction and the intent of the parties manifested by the writing.

County vs. *American Emigrant Co., 93 U. S., 124, 127.*

And that timber cut and lying on the ground at the date of the delivery of the deed would pass thereby.

Rogers vs. *Gilinger, 30 Penn. St. Rep., 185.*

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With reference to what constitutes adverse possession, Grier, J., in *Roberts* vs. *Moore, 3 Wallace, Jr., 292, 297*, said:

It is a question of intent by the actual occupant, and this intention may appear as well by actions as by words. It requires no special or verbal notice, but may be inferred from outward acts. Open and notorious claim of ownership and exercise of exclusive right, amount to actual ouster. If one take possession of property under a mistake in law, supposing it to be his, and the real owner, standing by, acquiesces, his conduct is a voluntary or confessed ouster on his part, and he cannot afterwards, when he discovers the mistake, say such possession was not adverse.

There is a common presumption applicable to every owner, that he knows the identity of his own land. Per *Agnew, J.*

Kaul vs. *Lawrence, 23 Sm.. 410, 417, S. P.*

S. P. Greene vs. *Smith, 57 Vt., 268.*

In *Palmer* vs. *Anderson, 63 N. C., 365*, the opinion of the court is as follows:

Settle, J.: "The plaintiff and defendant, being owners of adjoining tracts of land, agreed to have the line between them run so that the defendant might know how far he might clear his land, and for this purpose they employed one Pool to run the disputed line. In pursuance of this agreement Pool did run and fix a certain line as the true line between the parties, and when the survey was completed, the plaintiff said to the defendant and his sons, "Now, boys, you know where to come to." Soon, thereafter, the defendant took possession of the *locus in quo*, and began to clear and fence toward the line fixed by Pool, but did not cross that line. The plaintiff then brought this suit, and his Honor charged the jury that he could not recover unless the consent had been revoked, and they might look to the subsequent conduct of the parties to find the revocation.

Viewing the case in the most favorable light for the plaintiff we concur with his Honor that he could not recover unless he could show a revocation of his license."

The court then shows that the evidence upon the subject of revocation was not sufficient to be submitted to the jury, and the judgment is reversed.

Consent given to the taking, or acquiescence in the taking of that to which one supposes that he has no title, will not prevent a recovery of the thing taken when the true title is subsequently discovered. It will acquit the party taking from all claim for damages, direct or consequential, but it will not divest the title, nor prevent the owner from recovering the actual value of the property.

Here A pointed out to adjoining owner B, a supposed boundary, and forbade cutting trees beyond it. B cut within the line. It appeared A was mistaken and that the trees were on A's land.

Held he could recover in assumpsit.

Evans Miller, 58 Miss., 120, S. C. 38, Am. Rep., 313.

Hill vs. *Epley, 7 Casey, 334.* Extract from opinion of Strong, J.

The general princinal now is, that where the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting, to the prejudice of that other, the contrary of that of which his conduct has induced the belief. The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up. Thus, if a person *positively* encourage another to purchase either land or a chattel, he cannot afterwards assert any title in himself to the thing purchased, and this though he may have been ignorant of his rights when he gave the encouragement. For though, in the latter case, there may have been no fraudulent intent, yet the assertion of his title would operate as a fraud, as much so as if there had been a fraudulent purpose. Besides, the equitable principle is, that when a loss must befall one of two innocent persons, that one must bear it through whose act it was occasioned. It seems also to be well settled, that silence in some cases, will estop a party

against speaking afterwards. Thus, if one suffers another to purchase and expend money upon a tract of land, and knows that that other has a mistaken opinion respecting the title to it, and does not make known his claim, he shall not afterwards be permitted to set up a claim to that land against the purchaser. His silence then becomes a fraud. But, silence without such knowledge works no estoppel. It is only when silence becomes a fraud, that it postpones: *Beaupland* vs. *McKeen, 4 Casey, 124; Robinson* vs. *Justice, 2 Penn., 18; Keeler* vs. *Vantuyle, 6 Barr, 253.*

The citation from *Richman* vs. *Baldwin, 1 Zabriskie, 395,* in the brief, is a *dictum* from an opinion which cites and fully endorses the discussion in 2 American Leading Cases, a later edition of which is cited herein. From the same opinion the following is extracted:

I take it estoppel sometimes concludes the party without reference to the moral qualities of his conduct. It is otherwise, however, as to an estoppel *in pais*, which rests on the ground of fraud, fraud contemplated, not in the intention of the party, but in the effect of his conduct. This equitable estoppel rests upon the principle that when any one has done an act or made a statement which it would be fraud on his part to controvert or impair, and such act or statement has so influenced any one that it has been acted upon, the party making it will be estopped and cut off from the power of retraction. It must appear, first, that he has done some act or made some admission inconsistent with his claim; secondly, that the other party has acted upon such conduct or admission; and thirdly, that such party will be injured by allowing such conduct or admission to be withdrawn. It is intended that the acts and admissions of a party should operate againt him in the nature of estoppel when in good conscience and honest dealing he ought not to be permitted to gainsay them.

Citing *Picard* vs. *Sears*, and other cases collected in 2 Smith's Leading Cases.

After this definition of estoppel, the learned Court concludes that the redress claimed upon it must be sought in a court of chancery where it is invoked with reference to real estate.

In 1870 A built a house on land which he supposed was his, but in fact was owned by B, who was present and made no objection. In 1872 A mortgaged the premises to C, and B witnessed the deed, and subsequently A conveyed to C by warranty deed to extinguish the mortgage. On the death of C, in 1881, and the appointment of appraisers, B pointed out the house to them, saying that it belonged to C's estate, and it was appraised as such, and assigned by the Probate Court to the oratrix, C's daughter, as her distributive share. The referee found that B first knew in 1875 that the house stood on his land; and that there was no evidence which showed that the oratrix was influenced by what B said or did in accepting the house. Held, that B's conduct amounted to gross negligence or gross fraud, and in either case he would be estopped from claiming the house.

In the opinion, *Redfield, J.*, said:

When the defendant witnessed the mortgage deed, it was an assurance to Evarts that the defendant had no adverse claims upon the premises thus conveyed, and it was gross negligence and heedlessness if he did not know, and gross fraud if he did know, that the premises, thus pledged as a security for a loan to its full value, were a part of his own farm. In either case the defendant would be estopped from asserting title in itself. *Louks* vs. *Kennison, 50 Vermont, 116.* In the last, Kennison showed to the plaintiff the line fence as the true boundary of his farm, and verily believed it to be the true dividing line between the two lots of land, and relying upon the statement a purchaser bought the adjoining farm. There was no intended fraud or bad faith, but a careless negligence, which misled a purchaser of an adjoining farm. The party was presumed to know the boundaries of his own farm, and if he pointed out the wrong one, to the detriment of a purchaser, he must stand by his statement, as the truth, rather than by averring its falsehood, defraud an innocent purchaser.

Greene vs. *Smith, 57 Vermont, 268.*

In *Miller's Appeal, 84 Pa. St., 391*, it was held that where an owner of land in ignorance of his title thereto, by a posi-

tive act, induced a party to purchase such land from a third person, and the transaction on the part of all concerned is in good faith, he cannot afterwards, when he discovers his true title, set it up against the purchaser.

It was argued in that case that the truth concerning the title was open to Ahl as well as to Mary Ferguson, and when both have the means of knowledge there can be no estoppel.

Said Chief Justice *Agnew* in delivering his opinion:

"It is a case not of mere silence by one ignorant of her rights, but one where the positive act of Mrs. Ferguson in uniting with the executor to make the sale, misled. 'True, (says Gibson, C. J.,) the title of a party who ignorantly encourages another to purchase will be postponed; not, however, for fraud, but for having occasioned a loss which must be borne by some one, and consequently by the author of it:' *Paul* vs. *Squibb, 2 Jones, 290.* So Huston, J., says: 'There is another rule equally well settled, where at the time of a sale the seller or *any person present* represents the title to be in a certain way, and it turns out not to be so, yet as against the person making the representation it shall be as represented:' *2 Penna., 277.* In *Buchanan* vs. *Moore, 13 S. & R., 306,* it is said by Gibson, J., 'If both were equally innocent, a loss in consequence of the acts of declarations of the one ought not to be borne by the other.' The same doctrine is asserted in *Lewis* vs. *Carstairs, 5 W. & S., 209.* The doctrine of estoppel is largely discussed by Bell, J., in *Commonwealth* vs. *Moltz, 10 Barr, 527,* wherein he states it as an established principle 'that in all cases where an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to it.' See *al McKelvey* vs. *Truby, 4 W. & S., 325.* Without further citation, the doctrine of estoppel by acts of declarations is well summed up by Justice Woodward in *Beaupland* vs. *McKean, 4 Casey, 131.* He says 'The rule is clear that mere silence will postpone only when silence was a fraud; and a fraudulent concealment of title cannot be imputed to one who was ignorant that he had any title to conceal, but *positive acts* stand on a different ground. For there his title may be postponed even without fraud, in accordance with an equitable principle of universal application, that where a loss must necessarily fall on one of two innocent persons it shall be borne by him whose act occasioned it."

In *Buchanan* vs. *Moore. 13 S. & R., 304*, it was held:

If a defendant, at a time of the sale of his lands by the sheriff, represent to the purchaser that certain land is included in the levy, the land passes in equity to the purchaser, though it was not actually included in the levy, provided the purchaser was acting innocently.

Said Chief Justice GIBSON, in the opinion:

The points made by the plaintiff in error are founded on the assumption of the fact that the tract, for which he took defense in the court below, was actually excluded by the levy in consequence of which it was sold. If, by reason of the defendant's declarations at the sale, the plaintiff was induced to purchase, under a belief that it was included, although the sheriff's deed would not convey the legal title, yet his purchase would give him an equity which chancery would render effectual by decreeing a conveyance, and this, whether such declaration proceeded from a design or a misapprehension of the fact. If both were equally innocent, a loss in consequence of the acts or declarations of the one, ought not to be borne by the other.

Where a man encourages another to settle upon and improve land, and expend his money and labor upon it, he will not afterwards be permitted to take it from him, although he he has a later and a better title for it, and although his encouragement was given in ignorance of his own rights.

McKelvey vs. *Truby, 4 Watts & Sergeant, 323.*

In *Woodward* vs. *Tudor, 32 Smith, 382*, the following facts appeared:

Warrants 4900 and 4901 were taken out in 1794, in the name of Willink, and surveys made calling respectively for 4901 as southern boundary of 4900, and 4900 as northern boundary of 4901. Smith was in possession of 4900, then owned by Hurxthal. There was a line made in 1806, supposed to be the southern line of 4900. Afterwards another line, of 1794, twenty-six rods south was found, supposed to

be the northern line of 4901. Smith, assuming that there was a vacancy between the two lines, urged Shoemaker to enter and make an improvement, he to have the west half, and Smith the east. Shoemaker entered and improved his half, and with Smith's knowledge sold his right to Tudor, whom Smith encouraged, etc., to improve. It was ascertained that the supposed vacancy was in 4900. He obtained the title to 4900. Held, that he was estopped from setting it up against the part of the supposed vacancy held by Tudor.

It was said, in the opinion, that "Under such circumstances to allow Smith to sweep away the fruits of the industry of Shoemaker and Tudor, through the acquisition of an outstanding title, would be not only contrary to the law of estoppel, but unjust. If, in order to perfect their common title, Smith was obliged to buy in the Hurxthal title, he might have recovered from Shoemaker or Tudor one half the purchase money, on tender of a deed for the part claimed by them, by an equitable action of ejectment."

In this case it was argued on the part of the plaintiff in error that: "The fundamental principle of equitable estoppel is that when a loss must fall on one of two innocent parties, it shall be born by him whose fault occasioned it. But where they are equally innocent, and equally in fault, the doctrine has no application. Therefore, to constitute an equitable estoppel, it is a necessary ingredient 'that the actor, having no means of information, was by the conduct of the other, induced to do what, otherwise, he would not have done.'"

Although the judgment was reversed, the plaintiff in error did not succeed upon this point, but, on the contrary, it was held that where one advises and encourages another, as Smith did Shoemaker, to enter upon, invest his money in, or expend his money on land, with the assurance that he will thereby acquire title to it, such a one will not be permitted afterwards to call in question such title, even though he acted in ignorance of his own rights. Citing *McKelvey*

vs. *Truby, 4 W. & S., 323; McCormick* vs. *McMurtrie, 4 Watts, 195; Carr* vs. *Wallace, 7 Watts, 394; Millinger* vs. *Sorg, 5 P. F. Smith, 215.*

In *Millingar* vs. *Sorg, 5 Smith, 215,* Chief Justice *Agnew* (p. 225,) said:

"It is very clear that all the parties have acted in utter ignorance of the true location of their lands. Payne, and Morris, his vendee, believed that 4880 was 4881; and Benzinger and their vendees believed that 4881 was 4884, and all have continued to act accordingly. But Payne's act was a positive one, and misled all the others. He advised his principal to buy his own tract. He made the contract with McKee for it, he took the deed for it to his principals, and they paid the money for it. They actually purchased 4881, though denominating it 4884. They did not intend to buy 4884, but 4881 as it lay on the ground."

Payne was the agent of Benzinger and Eschback; Morris was Payne's vendee, and the question arose whether Morris was estopped.

The learned judge continued, p. 226: "He bought with a full knowledge that Benzinger and Eschback were claiming title to this tract, derived from Payne's agent while on their way to visit the land he intended to purchase, and then saw himself the improvements of Weiner, their vendee. More than this, he did not intend, in fact, to purchase this tract, for he was shown and actually bought 4880, and continued to hold it as his own until he sold it to Millingar. He stands also in privity with Payne as his alienee, who sold him the tract now known as 4880. It is true he was ignorant that his conveyance applied to the land which Payne induced Benzinger & Eschbach to buy, but this does not alter the fact that he did not buy that land, but bought and paid for the land covered by 4880; held himself out to the world as its owner, and so sold it to the plaintiff. His acts, as the alienee, united with Payne's act in keeping up the delusion originated by Payne. Under these circumstances, his purchase and continued claim of the tract known now as 4880 were positive acts, connected with Payne's act, characterizing his own continued silence, and this gave it also a positive effect in misleading those who were the professed owners of

4881. It was not mere silence, but an operative quietude injuriously affecting those in possession of 4881; and its effect is displayed in the extent and value of the improvements which sprang up during his undisturbed and long-continued repose. The case is uncommon—one of mutual error and of great hardship—but it is a mistake proceeding from one and the same person who misled all the rest, and which cannot now be remedied without great injustice to those who were first misled by Payne. It seems to be a case, therefore, to which we must apply the maxims, *prior in tempore, potior est in jure—melior est conditio possidentis.*"

In *McKelvey* vs. *Armour, 2 Stockton's Chancery, 115*, the Chancellor says:

But it is proved beyond all doubt that the complainant erected his improvements on this lot by mistake. He supposed that it was the lot next that belonged to Armour. Armour lived under the same mistake. He lived in the vicinity; he saw the complainant progressing, from day to day, with these improvements. If he knew this to be his lot, his silence was a fraud upon the complainant, but this is not pretended. He admits that he did not suspect the erections to be upon his lot until sometime after the erection, when by actual measurement, to his surprise, he discovered the mistake. Under such circumstances it would be most unjust to permit Armour to take these improvements, and to send the complainant away remediless.

It is very true, as was urged upon the argument, the complainant was most to blame in this matter. A diligent examination of the deed to Armour, and an actual measurement of the land would have decided the difficulty. But it was a vacant lot of land, plotted out upon a map only, and the mistake was one which might occur to the most careful and diligent man. The fact of Armour's standing by, and participating in the mistake, is an important feature in the case.

The plaintiff was relieved, and the opinion shows several alternatives offered the defendant, Armour, for an adjustment of the matter: either to purchase the improvements or to release the lot or to submit to a further decree.

In *Raley* vs. *Williams, 73 Missouri, 310*, a party applied to for information as to a title was held estopped, by his statement that it was good so far as he knew, from setting up a tax title to the same land vested in himself, of which he did not know or had forgotten.

The Court said: In such circumstances the plaintiff was in duty bound to give what he knew to be correct information, or else to refuse information altogether, and cannot now shelter himself behind the plea of momentary ignorance respecting the desired information. If a man "makes a misrepresentation as to what he ought to have known, and what he did at one time know, although he alleges that at the particular moment he had forgotten it, and injury ensues, the maker of the misrepresentation is equally as answerable, equally bound to make such misrepresentation good, equally estopped from asserting the contrary of his misrepresentation, as if he knew, when uttering it, it was false." Citing *Burrowes* vs. *Lock, 10 Vesey, 470.*

In *Storrs* vs. *Barker, 6 Johnson's Chancery, 166, 10 American Decisions, 316*, it was held that when the circumstances would otherwise create an equitable bar, ignorance of one's legal right does not take the case out of the rule.

In *Hendricks* vs. *Kelly, 64 Ala., 388*, it was held that declarations, though made innocently and inadvertently, operate as an estoppel against the party making them. The statement in this case was with reference to a claim under a trust deed.

In *Payment* vs. *Church, 38 Mich., 776*, the court refused to permit the plaintiff to show that at the time of the execution sale of the property in dispute he did not know of any defects in the judicial proceedings which would render the judgment and execution sale thereunder void, the judgment having been rendered against himself and others, and the property being sold to satisfy the judgment.

The Court say: If irregular, he clearly could waive the irregularity, and this he might do by actions as well as by words, and the effect upon the defendants would be precisely the same, whether he knew of the defective proceedings previous to the sale or not.

In this case he was present and a bidder at the sale.

In *Coleman* vs. *Pierce, 26 Minnesota, 123*, it was held that when want of knowledge is an act of culpable negligence, the law fixes the same consequences to it as to an intentional and known misrepresentation.

In *Continental Bank* vs. *National Bank, 50 N. Y., 575*, a bank was held estopped by its teller's pronouncing the certification of a check presented to him to be genuine, when in fact it was forged. The Court said it was not necessary to an equitable estoppel that the party should design to mislead.

In *Davenport Central R. R. Co.* v. *Davenport Gaslight Co., 43 Iowa, 301*, a gas company, with the permission of the municipal authorities, had laid down and was maintaining its pipes in the streets of the city, and the street railway company was incorrectly informed by the employes of the gas company respecting the location of the pipes, so that the railway track was laid over them.

The court *obiter* observed: "If we are correct, and the company did wrongly represent the location of the pipes so as to lead plaintiff to lay its track over them, when it was seeking to avoid them, and seeking information from the defendant for the purpose of avoiding them, then we think the defendant would be estopped from claiming the right to disturb the plaintiff's track, even though it was mistaken in regard to the location of the pipes the time the representations were made."

Ignorance does not acquit where it is one's duty to know the truth.

Mutual Life Co. vs. *Norris, 31 N. J., 583.*

A and D owned adjoining lots in a city addition. D had his lot surveyed by the surveyor who laid out the addition, and commenced to build his house up to the western boundary line. A relying upon D's survey measured off 25 feet westward and built up to his western boundary line, finishing his house months before D finished his, and by permission used D's fence for the eastern wall of his coal shed. Eight years afterward A discovered that D encroached upon his lot four inches, and commenced an action of ejectment. Held, that these facts constituted an estoppel, and that A's ignorance of the true line was immaterial, the question being one of estoppel by acts *in pais.*

Action vs. *Dooley, 6 Mo. App., 323.*

In *Beardsley* vs. *Foot, 14 Ohio St., 414,* a party was estopped by his representation that certain land which another proposed buying, was free from a lien, when the statement was made under a supposition that a judgment held by him was paid.

In *Miller* vs. *Syracuse and Auburn R. R. Co., 6 Hill, 64,* the court held that although a parol license to enter and raise an embankment on the plaintiff's land was essentially revocable, and might be canceled after it had been executed, it was, notwithstanding, a justification for acts done while it was still in force, and that the plaintiff could not recover for injury inflicted on his land without proving that the license was recalled, and the defendants went on with notice of the revocation. "Whether the case at bar," said Cowden, J., in delivering the opinion of the court, "be or be not distin-

guishable from those which hold that neither corporeal nor incorporeal hereditaments can be conveyed by parol need not now be decided. Suppose it be not distinguishable. Suppose the right which the defendants claim to exercise could not be granted by a parol license executed. There is still nothing in the case to prevent the license operating according to its own nature; and there is no book which teaches that before a license is revoked or has expired, though it be not executed, a man is liable to pay damages for availing himself of it. . . In *Willis* vs. *Harrison, 4 M. & W., 538*, which was a case by a reversioner for digging the soil and embanking and making a railway in the close possessed by his tenant, the defendant pleaded license from the dean and chapter of Durham, who were seized before the plaintiff had any interest; and it was not doubted that the license, though unexecuted, would completely protect the defendant up to the time when the dean and chapter parted with their interest to the plaintiff. It does not follow, by any means, that because a license is void for the purpose of carrying an interest irrevocable, it may not endure as a personal authority, and until revoked protect the defendant against an action for a wrong. Indeed, there cannot, in the nature of things, be any legal wrong until the license is countermanded, unless it can be said that one may do an actionable wrong to himself touching his own property." . . . *2 Am. L. C., 5 Ed., 566.*

One of the best established rules of the common law requires that an obligation should not be dissolved by any means of less degree than those through which it arose. While, therefore, an executory parol contract may, even when reduced to writing, be rescinded orally at any time before breach, *Foster* vs. *Dawber, 6 Excheq., 839;* specialties are governed by a different principle, and cannot be varied or annulled by a subsequent agreement which was not written,

and under seal. *1 Smith's Leading Cases, 557, 574, 6 Am. ed.* This is true as it regards the obligation of contracts, but there appears to be no sufficient reason why a license should not be justification for an act done or omitted while standing and unrevoked. The maxim *concensus tollit injuriam* is of general application when the alleged wrong is not *malum in se* and would seem to be equally in point whether the default consists in the violation of a vested right or one arising under an executory agreement. . . . . If the right conveyed by a conveyance can be waived orally after the execution of the deed, such a license should be equally effectual when there is a mere agreement to convey. *Pierrepont* vs. *Banard, 5 Bard.; 364; 2 Seldon, 279.* The maxim *volenti non fit injuria* seems to be equally applicable, whether the alleged wrong consists in the non-performance of a contract, or an entry on land. *Watchman* vs. *Cook, 5 Gill & J., 289; 2 Am. L. C., 5 Ed., 590.*

Whatever doubt may exist as to the length of time during which a license should be held to endure, or the circumstances which will render it irrevocable, it will still unquestionably protect those who act under it without notice of a change of purpose on the part of the person by whom it was given. Good faith requires, and the plainest principles of justice demand, that the owner of land should not treat acts done under his authority, or with his express or implied sanction, as wrongful, or make them the foundation for a recovery in damages. This is too plain for demonstration, when the authority is express, and equally true when it is implied from facts and circumstances, or the relations which subsist between the parties. *13 Conn., 36; 34 Conn., 529.* Indeed, to use the language of Chief Justice Vaughan, in *Thomas* vs. *Sorrell*, the very essence of a license is to render that lawful which without it had been unlawful, and no citation of authorities is necessary to show that a man cannot authorize another to enter upon or to walk over his

land, and then sue him in trespass for taking advantage of the permission. Hence, a license will be a full justification for all acts done in pursuance of it while unrevoked, even when they consist in the exercise of a temporary ownership or dominion over the land, and would, if repeated under a claim of right, have the character of an estate or easement. *22 Vermont, 295; 38 Missouri, 588; 29 N. Y., 634; 4 Foster, 176; 1 Manning, 107.* The law has been so held in England from the earliest period, and is equally well settled in this country. The breadth of the authority or the extent to which it goes, makes no difference in the principle, and the license will be a justification, even for those acts which, like cutting down a wood, or removing ore or gravel from a quarry, vary the character of the land, or deprive the inheritance of its just value. *Pierrepont* vs. *Barnard, 5 Barbour, 364; 2 Selden, 279; 22 Barbour, 336.* Hence, although the right given by a permission to remain upon or use the premises of another ceases as soon as the permission is withdrawn, and will, therefore, form no defense to an action of ejectment, it will, notwithstanding, be a good answer to an action of trespass, brought to recover the mesne profits of the land for the period during which it continued. This is a necessary inference from the cases of *Smith* vs. *Goulding, 6 Cushing, 154,* and *Syron* vs. *Blakeman,* which establish the point, although in a somewhat different form.

Prince vs. *Case; Rerick* vs. *Kern, 2 American Leading Cases, 5th Ed., 540. Citation last above from p. 563.*

APPENDIX.

Copy Rule of Supreme Court of Pennsylvania Relating to Paper Books.

Rule XVII.

In case where the writ of error is to a judgment on a verdict, the paper book of the plaintiff in error shall contain the following matters, in the following order: 1. The names of all the parties as they stood on the record of the Court below at the time of the trial, and the form of the action. 2. An abstract of the proceedings, showing the issue, and how it was made, 3. The verdict of the jury, and the judgment thereon. 4. A history of the case. 5. The points, if any, which were submitted in writing to the Court below. 6. The charge of the Court. 7. The specifications of error. 8. A brief of the argument for the plaintiff in error. 9. An appendix, containing the evidence, and if necessary, the the pleading in full.

COPY OF BOOK OF PLAINTIFF IN ERROR IN PACKER *vs.* SCHRAEDER, EXCEPTING MAPS AND APPENDIX.

In the Supreme Court of Pennsylvania.

EASTERN DISTRICT.

NO. 41, JULY TERM, 1880.

E. A. PACKER,
Plaintiff in Error and Plaintiff below,

vs.

SCHRAEDER MINING AND MANUFACTURING COMPANY,
Defendants in Error and Defendants below.

ERROR TO THE COURT OF COMMON PLEAS OF BRADFORD COUNTY.

D. C. DEWITT, *Attorney for Plaintiff in Error.*

TITLE AND FORM OF ACTION.

E. A. Packer, Mary E. Cryder, Guardian of Lexy DeWitt, minor child J. DeWitt, dec'd, and M. W. DeWitt, Adm'r *d. b. n.* of estate of J. DeWitt, deceased, now to use of D. C. DeWitt, *vs.* The Schrader Mining and Manufacturing Co., and V. E. and J. E. Piollet.	Common Pleas Bradford County. No. 384, May T., '77. Trespass, Q. C. F. for cutting down and carrying away timber, trees, and bark.

ABSTRACT FROM APPEARANCE DOCKET.

E. A. Packer, Mary E. Cryder, Guardian of Lexy DeWitt, minor child of J. DeWitt, dec'd, and M. W. DeWitt, Adm'r *d. b. n.* of the estate of J. DeWitt, dec'd, to the use of D. C. DeWitt,

vs.

The Schrader Mining and Manufacturing Co., and V. E. and J. E. Poillet.

Summons against defendants in Trespass, for cutting timber, issued Feb. 26, 1877.—Narr filed same day, and Plaintiff refers.

Summons and Rule returned served on all Defendants, March 8, 1877. June 16, 1877, Nol. Pros. as to V. E. and J. E. Piollet. June 16, '77, award of arbitrators filed. Defendants appealed same day. July 28, '77, defendants plead not guilty. Nov. 10, '79, case put at head of list. Dec. 15, '79, case came on for trial. Jury sworn same day. Dec. 17, '79, plaintiff ask to amend the record by striking from the parties plaintiff all names except that of E. A. Packer, so the suit will stand E. A. Packer *vs.* The Schraeder M. & M. Co. Same day, after filing affidavit of D. C. DeWitt, amendment allowed. Same day, by leave of Court, defendants add the plea *lib. ten.* Defendants allege suprise and case continued till next term. Dec., 1879, rule to show cause why plaintiff shall not give security for costs. Feb. 10, 1880, bond for costs approved by the court. Feb. 12, 1880, case came on for trial. Jury sworn same day to well and duly try the issue, &c. Feb. 16, 1880, plaintiff asks to amend Narr by striking out against the provisions of the act of 29th March, A. D. 1824. Allowed same day. Feb. 17, 1880, plaintiff's points filed. Same day plaintiff excepts to charge of the Court taken after charge and before verdict. Defendants except same day to charge of the Court, and asks that the same be filed of record; taken after charge and before verdict. Same day the jury aforesaid say in their verdict on their oaths that they find for the defendants.

Feb. 19, defendants' bill of costs filed. Sheriff's receipt for jury fee filed same day. Feb. 20, reasons for a new trial filed, and leave to move for rule. March 29, April 5, rule refused; whereupon, judgment in favor of defendants and against plaintiffs for costs. April 15, 1880, writ of error filed and served on Davies & Carnochan, for defendants. April 15, 1880.

VERDICT OF THE JURY.

Feb. 17, 1880: The jury aforesaid say in their verdict, on their oaths aforesaid, that they find for the defendants. April 5, 1880, judgment against the plaintiffs and in favor of the defendants for costs.

HISTORY OF THE CASE.

This is an action in trespass *q. c. f.* for timber felled and converted. The plaintiffs claimed for about two million feet of lumber, and upwards of one thousand cords of bark. Defendants plead "not guilty," and *lib. ten.* The plaintiff owned a tract of unseated land (George Moore) containing 475 acres and allowances. Warrant April 12, 1792, for 400 acres adjoining or near lands this day granted to Samuel Temple. Survey November 21, 1792. Returned endorsed, "Returned," &c. January 8, 1795, plaintiffs gave in evidence warrant return of survey, endorsement of return, patent, deeds, &c., showing title from the Commonwealth down to him. Plaintiffs also showed that he and those under whom he claimed had paid the taxes down to the time of the alleged trespass, which was committed in 1867-'68 and '69. Plaintiffs then called practical surveyors, who located the George Moore warrant. They located this tract by original marks found upon the ground. The return calls for a hemlock at the northeast corner. This they found, blocked it, and it was plainly marked on four sides for a corner of the George Moore. Commencing at the southwest

corner of the Moore and running north, they found the west line plainly marked for nearly 100 rods; this brought them to the northeast corner of the Robert Irvine, a tract of land surveyed the next day after the Moore, and calls for it, as the evidence showed. The Irvine calls for Hem. Sap. Cor. This corner was found plainly marked 1792. From this point north no line could be traced. The defendants had cut nearly all the timber. The returned survey shows the Schraeder creek crossing this line about 100 rods north of the hemlock sapling corner. The surveyors found this creek correctly laid down. This creek is large enough to float logs. They found no original marks on the north line; found old marks, but could not count them. The timber had been cut up to this line by defendants. The south line of the Moore was probably not run. The Moore was surveyed in a block with three other warrants. The Moore is the north tract of the block. The plaintiff then gave evidence of the value of the timber, &c.—showed that defendants took all the valuable timber from about 250 acres of the Moore, and rested his case.

It was admitted that defendants had title to a tract of 409 acres of unseated land called Andrew Tybout, and that they had paid the taxes also. They put in evidence warrant, survey, and patent. Warrant 15 Feb., 1794. Survey, March 24, 1794. There is an interference of about 250 acres between the Moore and Tybout tracts. The Tybout covers about 250 acres of the northern portion of the Moore. Defendants claimed the survey of the Moore was a chamber survey. The court instructed the jury that this was the principal question as to title, &c. The return of the Moore calls for vacant land on the north; vacant and lands of Gen. Broadhead on the west; the Samuel Cooley on the south; and Henry and Joseph Betz on the east. Defendants' evidence showed clearly that the east line was plainly marked 1792; that the northeast corner (hemlock) was marked on four sides 1792; that the west line was marked 1792 for about

100 rods to the hemlock sapling corner; that the hemlock sapling corner was 1792; that Irvine tract was actually located in 1792; that the Samuel Cooley was located in 1792; that Schraeder creek was correctly laid down on the Moore return, 100 rods north of the hemlock sapling corner. The evidence showed that the Betz tracts on the east were warranted 25 Feb., 1793, and surveyed July 4, 1793. The Betz called for a post on the northeast corner of the Moore. The Court instructed the jury that the plaintiff's title would date from his warrant; that the survey was not returned to the land office till January 8, 1795; that they must find whether the draftsman at the land office, in making this map, (the return) made a mistake in putting the Betz tracts on for calls on the east, or whether the return was made in the office of the deputy surveyor after the Betz tracts were returned. There was no evidence that the Betz tracts were ever returned.

Before giving this instruction, the Court had said to the jury: "In many instances he (the deputy surveyor) neglected to do his duty, and omitted to do this, and made a draft in his office," &c. The Court also said to the jury: "It may be difficult to say whether the line was run in November, '92, or July, '93;" and in this connection said, "'tis not enough that he was there to survey other warrants that adjoined," &c. The Court also suggested a theory by which the jury might find that the actual marks corresponding with the Moore survey, in the west line, might be unheeded by finding that they were made to locate other warrants. The Court instructed the jury: "that the undisputed evidence shows the Tybout was actually located on the ground in 1794." The return of the survey put in evidence by the defendants showed that their corners were on the wrong side of the Schraeder creek. A connected draft of the Tybout and Irvine showed that the Schraeder creek would not come together by almost a mile; that the Geo. Moore is not indicated except as south of the Tybout on the Broadhead map of 1799, or the Flower map of 1828.

These maps did show the interference. Defendants called Joseph Powell, who admitted that he erased the dotted line running from the hemlock sapling corner north. The verdict was for defendants. The plaintiff moved for a new trial. To sustain his motion, he produced "extracts from deputy surveyor's list of return," which showed that the Moore, Irvine, Cooley, Henry Betz, and Joseph Betz, were all returned by the deputy surveyor on the 16th day of April, 1794. The court refused the motion, and plaintiff removed the case to this court.

PLAINTIFF'S POINTS.

1st. The Court is respectfully requested to charge the jury. The return of the survey of the George Moore warrant, as is shown by the evidence in this case, establishes, *prima facie*, that the said tract was located by a survey upon the ground as set forth in said return, and the burden of proof is upon the defendants to show to the contrary.

2nd. That if the jury find from the evidence that the Schraeder creek located upon the ground across the west line of the George Moore, as indicated in the return of survey, this is strong evidence of an actual survey.

3rd. That slight marks upon the ground indicating an actual survey, should after the lapse of eighty-seven years, have great weight in repelling the charge of a chamber survey.

4th. That in order for the jury to determine that the George Moore was actually run upon the ground as is shown by the return of survey, it is not necessary at this date, after a lapse of eighty-seven years, after the destruction of most of the timber by fire and the hand of man, that the marks of a survey of 1792 should be found on more that one of the lines.

5th. If the jury believe that J. DeWitt, while acting as agent of E. A. Packer, was the attorney of the Schraeder M. & M. Co., and also a stockholder in said company, which

fact was unknown to said E. A. Packer, (and there is no evidence that he knew it,) any agreement, consent, or authority he gave to the said Schraeder M. & M. Co. to cut timber upon the land of said Packer, without the express authority of said Packer, was not binding upon said Packer, as against said Schraeder M. & M. Co., which knew that Jacob DeWitt was at that time agent for said Packer.

1. Affirmed.

2. Affirmed also, if the jury find that the Schraeder creek crossed the western boundary where the official map shows it crossed. If it does not, it is some evidence tending to show there was no survey in fact of that line in 1792.

3. Affirmed, if such marks are original marks.

4. Affirmed.

5. Denied as a whole. DeWitt was the attorney of the defendant. If he acted honestly as such attorney, and honestly also as Packer's agent, Packer would be bound by his acts and declarations. If he did not so act, Packer would not be bound. It is therefore a question for the jury.

CHARGE.

This is an action *q. c. f.* It was commenced Feb. 26, 1877. Elisha A. Packer, of the city of New York, is the plaintiff. The Schraeder Mining and Manufacturing Company is the defendant. The plaintiff claims that the defendant, by its agents and employes, entered upon his lands in the year 1867, '68, and '69, and cut and took therefrom over two million feet of lumber; that this lumber consisted of hemlock, pine, and hard wood, and was of great value, to wit: of the value shown by his evidence, and he claims to recover the value of the timber as it stood in the tree, as the damages he sustained.

To this claim and allegation the defendant plead not guilty and *lib. ten.*, that is to say, the defendant denies that it cut any timber on plaintiff's land—that whatever timber was cut was cut upon the lands of the defendant. The de-

fendant also avers, that even if the plaintiff did own the land where the timber was cut, his agent, Jacob DeWitt, aided in establishing what is known as the "painted line," and said to the officers and agents of the defendants that Packer's land extended only to that line, and they could cut as they pleased beyond it. Under the plea of *lib. ten.*, the burden of proving title is on the defendant, but under his plea of not guilty, he may show title.

The first question is, who owned the land, the plaintiff or defendant? If the plaintiff owned it when the timber was cut, he is entitled to recover, unless the acts and declarations of his agent, DeWitt, estops him. If the title of the land was in defendant, there was no trespass, and your verdict should be for the defendant.

The plaintiff claims the land under the George Moore warrant. The defendant claims it under the Andrew Tybout warrant. He, plaintiff, has showed title in himself of the Moore tract, and the defendant in itself of the Tybout.

The Moore warrant was issued April 27, 1792. It was not returned to the office until the 8th of January, 1795, but upon its face it states the survey was made Nov. 21, 1792.

The Andrew Tybout warrant was issued 15 Feb., 1794, and surveyed 24 March, 1794.

If there was a survey under the Moore warrant before the 24th March, 1794, the time the Tybout was surveyed, the title under the Moore patent dates back the date of the warrant; but it was not surveyed until after the Tybout was surveyed, then the title to the land was in the defendant. I mean by survey, actual survey on the ground. It was the duty of the deputy surveyor to go upon the ground, run and mark the lines, and establish the corners. In many instances he neglected his duty and omitted to do this, and made a draft in his office of a pretended survey, and returned it into the land office. These surveys so returned, but never actually made on the ground, are commonly called "chamber surveys." It is claimed on the part of the defendant

that the survey of the Moore warrant was a chamber survey. This allegation presents the principal question as to title; for I think the undisputed evidence shows that the Tybout was located by actual survey in the year 1794. Had the Moore been surveyed before that time? To determine this question you must consider all the evidence bearing upon it. I think there is no dispute about but that the line for a long distance both north and south of the hemlock corner was run upon the ground in the year 1792. It is not enough that he was there to survey other warrants that adjoin it. Was he there, and did he survey the Moore warrant? Also the line south from the hemlock sapling corner bears the marks of 1792. There is a dispute as to the line running from the sugar corner to the hemlock sapling. The evidence on the part of the plaintiff tends to show that it was run in 1794, while the evidence of the defendant tends to show it was run in 1792. The time it was run may have some weight in determining the date of the Moore survey; for there is no claim that the line on the south side of the Moore tract was run prior to 1875. None of the surveyors have been able to find any old marks on the line projected northerly from the hemlock sapling corner. If the jury find that the line was not run in 1792, it may have a bearing upon the question whether the Moore survey was made in that year, for it is probable the survey would run 94 perches on the west line to the hemlock sapling and run no further. Would it not indicate rather that the survey was of other warrants?

As to the line between the sugar corner and hemlock sapling, the surveyors have brought in blocks, and they do not agree in the couunt of the number of grains. You are to determine its age under the evidence. If you find it was surveyed in 1794, it overthrows the defendants' theory that it was a part of the survey of 1792, to wit; extension of the line which runs south from the hemlock sapling. If you find it was surveyed in 1792, has it not a tendency to show that it was a part of the survey of the line coming from the south to the hemlock sapling?

The evidence shows that the Joseph Betz and Henry Betz are on the east. Both were warranted in 1793, and surveyed July 4, 1793. This fact may bear upon questions as the date of the survey of the line south from the hemlock, and of the marks found upon that corner; for it may be difficult to say where a line was surveyed July 4, 1793—whether it was surveyed in 1792 or 1793. The official copy of the Moore calls for the Betz on the east. This may be the mistake of the draughtsman at the land office; but is it a mistake? Has it not a tendency to show a chamber survey—one made after the Betz had been surveyed and returned to the land office? It (George Moore) calls for vacant land on the north. The Gobett tract is there, but it was not warranted until 1794. The call, therefore, is correct, and ought it not to have called for vacant land on the east, if it had been actually surveyed November 21, 1792? It was vacant land on its east November 21, 1792. The Betz warrants had not then been issued, and unless the draughtsman at the land office made a mistake, they could not have been put on as calls, because they did not then exist.

Again, it is proper for the jury to take into consideration the course of the streams as indicated by the official draft, to determine whether the Moore was surveyed in 1792. (The attention of the jury was called to the water courses as indicated on the different maps, and also where the Schraeder creek crossed the west line of the Moore.) To determine whether the Moore tract was actually surveyed in 1792, the original marks on the ground, if any, are the strongest and best evidence. If it is doubtful whether the marks were made in at that time, then the jury should consider the calls—water courses. If the official drafts show a correct location of the water courses, it is evidence to show actual survey. If they are not so laid down, it is evidence which may have a tendency to show that there was no actual survey. If, after examining this evidence, there is still doubt, it is proper to consider the old maps in evidence—Broadhead's map of

1799, and Flowers' map of 1828. It is proper to consider these maps as parts of the evidence. They show where the Tybout was located then, to wit: 1799 and 1828. The Moore tract is not indicated on either map, except as south of the Tybout.

If after considering all the evidence, you find that the Geo. Moore was not surveyed in 1792, and find that Tybout was surveyed in 1794, and before Moore was surveyed, that ends the case, and your verdict should be for the defendant. If the Moore was surveyed in 1792, the title was in plaintiff, and as we have already stated, he is entitled to recover whatever damages he sustained, unless he is estopped by the acts and declarations of his agent, and therefore if you find the Moore was surveyed prior to 1794, then you must consider the evidence relating to Jacob DeWitt's agency. Was he agent of Packer, and had he the authority to establish the lines of his lands? He was the attorney of the Schraeder Land Co., but this did not make him incompetent, if he acted in good faith towards Packer. If he did not, Packer would not be bound, if he did not know DeWitt was the attorney of the Schraeder Land Co. If you find he was Packer's agent—acted in good faith—had power to consent and did consent, for Packer, to the running and establishing the painted line—agreed upon Walker to run it, and for Packer told the officers and agents of the Schraeder Land Co. that Packer's land extended to that line, and they could cut on the tract now in dispute, the plaintiff cannot recover, although you find the Geo. Moore was surveyed in 1792. (The Court here called the attention of the jury to the evidence relating to DeWitt's agency, power, acts and declarations.)

If you find for the plaintiff, the measure of his damages under the pleadings, is the value of the timber at the time it was cut down and taken away, from which you may add interest from that time to this.

(Defendant's points answered and filed.)

Specifications of Error.

The Court erred in charging the jury as follows:

1. The Moore warrant was issued April 27, 1792. It was not returned into the office until January 8, 1795.

The Court erred in charging the jury as follows:

2. If there was a survey under the Moore warrant before March 24, 1794, the time the Tybout was surveyed, the title under the Moore patent dates back to the date of the warrant.

The Court erred in charging the jury as follows:

3. I mean by survey, actual survey on the ground. It was the duty of the deputy surveyor to go upon the ground, run and mark the lines and establish the corners. In many instances he neglected his duty and omitted to do this, and made a draft in his office of a pretended survey, and returned it into the land office. These surveys so returned, but never actually made on the ground, are commonly called chamber surveys. It is claimed, on the part of the defendant, that the survey of the Moore warrant was a chamber survey. This allegation presents the principal question as to title.

The Court erred in charging the jury as follows:

4. For I think the undisputed evidence shows that the Tybout was located by actual survey in the year 1794.

The Court erred in charging the jury as follows:

5. Had the Moore been surveyed before that time? To determine this, you must consider all the evidence bearing upon it. I think there is no dispute but that the line for a long distance, both north and south from the hemlock corner, was run upon the ground in the year 1792. 'Tis not enough that he was there to survey other warrants that adjoin it. Was he there, and did he survey on the ground the Moore warrant?

The Court erred in charging the jury as follows:

6. None of the surveyors have been able to find any old marks on the line projecting northerly from the hem. sap. corner. If the jury find that line was not run in 1792, it may have a bearing upon the question whether the survey

was made in that year, for is it probable the surveyor would run 94 perches on that line to the hemlock sapling and run no farther? Would it not indicate rather that the survey was of other warrants?

The Court erred in charging the jury as follows:

7. As to the line between the sugar corner and hemlock sapling. The surveyors have brought in blocks, and they do not agree in their counts of the number of the grains. You are to determine its age from the evidence. If you find it was surveyed in 1794, it overthrows the defendant's theory that it was a part of the line which runs south from the hemlock sapling corner. If you find it was surveyed in 1792, has it not a tendency to show that it is a part of the survey of the line coming from the south to the hemlock sapling?

The Court erred in charging the jury as follows:

8. The evidence shows that the Joseph Betz and Henry Betz are on the east. Both were warranted in 1793, and surveyed July 4, 1793. This fact may bear upon questions as to the date of the survey of the line south from the hemlock and of the marks found upon that corner. For it may be difficult to say where a line was surveyed July 4, 1793, whether it was surveyed in '92 or '93.

The Court erred in charging the jury as follows:

9. The official copy of the Moore calls for the Betz's on the east. This may be the mistake of the draughtsman at the land office, but is it his mistake? If not, has it a tendency to show a chamber survey—one made up after the Betz's had been surveyed and returned to the land office? It (Geo. Moore) calls for vacant land on the north. The Gobett tract is there now. But it was not warranted until 1794. The call therefore is correct, and ought it not to have called for vacant land on the east, if it had actually been surveyed on Nov. 21, 1792. The Betz warrants had not then been issued, and unless the draughtsman at the land office made a mistake, they could not have been put on as calls, because they did not then exist.

The Court erred in charging the jury as follows:

10. If after examining all the evidence there is still doubt, it is proper to consider the old maps in evidence—Broadhead's map of 1799, and Flower's map of 1828. It is proper to consider these maps as parts of the evidence. They show where the Tybout was located then, to wit: 1799 and 1828. The Moore tract is not indicated on either map, except as south of the Tybout.

ARGUMENT.

1. "Prior to 1800 the Surveyor General indorsed no acceptance upon returns." In this the indorsement upon the return was the only evidence as to the time the return was made, which was in these words: "Ret'd, &c., 8 Jan'y, 1795. This showed there had been a return prior to this date.—"When a survey is found in the office, without any marks or other evidence when it was returned, it becomes a matter of fact for the jury to determine when it was returned; and it is error in the Court to give a legal direction on the subject."—*4 W., 132.*

2. The George Moore warrant is for "400 acres of land adjoining or near land this day granted to Samuel Temple." This contains no location such as is required for the inception of title: *Duncan* vs. *Curran, 3 Binn., 14; Chambers* vs. *Mifflin, 1 P. & W., 74.* This instruction gave the warrant too great force, the excess of which was taken from the survey, which was the object of attack by defendant. "Precisely descriptive warrants are those which so clearly describe the land that it can be readily identified and the warrant applied; they take title from their date. A vaguely or loosely descriptive warrant taken from the survey."—*23 P. F. S., 310.* Plaintiff by his counsel, in opening his case to the jury, claimed title from the date of the survey; that the survey was the inception of title and until this was actually made he had no location. In closing his case he claimed title from

Nov. 21, 1792, which was the date of his survey. The instruction of the Court, threw him in an apparent error before the jury which could have had no other than a bad effect. After retiring, it is probable the first inquiry of the jury was, what is the date of plaintiff's title? Answer: He claimed from his survey, but in this was wrong. This injured plaintiff by taking the foundation from his first position, and by making the necessity for an early survey less apparent, by placing it simply as a link in his chain of title instead of the head of it, or the very object from which his title dated. "The instruction was undoubtedly erroneous and for this we must reverse the judgment. It is no answer to such an error that elsewhere in the charge the doctrine may have been accurately stated, &c. We could not affirm a judgment on such a verdict without affirming an error."—*Riddleburg Coal Co.* vs. *Rogers, 15 P. F.* S., *418.* Unless it can be said the error could have done no harm the judgment must be reversed.—*9 W. N. C., 283.* His Honor also erred in this, in assuming the Tybout was actually located in 1794.

3. There was no evidence in this case that the deputy surveyor "in many instances neglected and omitted to do his duty." According to this the presumption is, that the officer who was acting under oath, did not do his duty unless the affirmative is proved. This is in direct contradiction to what C. J. Tilghman said in *4 S. & R., 293:* "Had the charge been that great regard should be paid to the return of the surveyor, and that slight proofs of lines or corners marked, would justify the jury, &c. I should have heartily agreed to it." Again, on page 294: "Neither should I object to a charge which pressed upon the jury the propriety of presuming that a sworn officer had told the truth," &c. This case last referred to, was tried thirty-three years after the survey had been made. Our case is eighty-seven years after, or fifty-four years more. "A chamber survey is not *ipso facto* a void act." —*Glass* vs. *Gilbert, 8 P. F. S., 291.* This instruction, after assuming the Tybout located, and adding: "It is claimed on

the defense that the survey of the Moore warrant is a chamber survey; this allegation presents the principal question as to title"—threw us into the arms of the enemy without weapons. The presumption was that the officer did his duty.—*Meade* vs. *Hay, 3 Y., 71; Wilson* vs. *Horner, 9 P. F. S., 164.*

4. The Schraeder Creek, which is large enough to float logs, is not laid correctly, in their return; the creek will not come together by almost a mile, and their corners are on the wrong side of the creek. See connected draft of the Irwin and Tybout, No. 2, and the return of the Tybout, No. 5.

5. If the line from the hemlock corner, both north and south was run in 1792, which corresponds with the date of the Moore survey, this was sufficient to impel the allegation that the Moore was a chamber survey, and the Court should have so stated to the jury. "One line, or a part of a line, of an old survey, found on the ground, made the whole good."—*Norris* vs. *Hamilton, 7 Watts, 97.* "It is sufficient evidence of an actual survey to show that any part of it was made on the ground."—*13 Serg. & Rawl, 113.* "It is not essential to the validity of a survey in all cases, that the deputy surveyor should have gone on the ground to execute the wrrrant; if the land be bounded, &c., it is sufficient."—*2 Watts, 390.* "If it be by the adoption of old lines, or older surveys, made under authority of law, to the same extent that is necessary to make a good survey on the ground, it is as valid as though done by running and marking the line afresh."—*Glass* vs. *Gilbert, 8 P. F. S., 291.* "The adoption of old lines legally made is as good as the marking of new lines, the *rule in such cases being not to re-mark.*"—*Ibid.*

6. The surveyors all found Schraeder creek correctly laid down as crossing this line at a point more than one hundred rods north of hemlock sapling corner. "For in a case like the present, where lines corresponding with those set forth in the return of the survey, are found marked on the ground, there is but one conclusion to be drawn, which is, that they

were intended, and must be construed as the true boundaries of the survey returned."—*Adams* vs. *Jackson*, *4 W. & S., 82.* That the line could not be found eighty-seven years after survey was made is no evidence the line was not run."—*Bellas* vs. *Levan*, *4 Watts, 294.* That the west line extended north from the hemlock sapling corner, there could have been no fair dispute. The creek was correctly laid, crossing this line more than one hundred rods north of this corner. That the line extended there was a "violent presumption—a legal conclusion."—*10 Casey, 469.*

7. Trescott, a witness produced by the defendant, explained the line from the hemlock sapling corner, across to the sugar corner. See Appendix, 156. This witness, in his cross-examination, says he found the west and east lines mark for the Moore. He also says the hemlock at the northeast corner was marked on four sides, 1792. Old marks were found on the north line, but they could not be counted with certainty. The idea of explaining away lines corresponding with an official return, 87 years after the survey was made, is new and should be strangled at once. The theory that the line running across the Moore is an extension of the west line of the Cooly, Hardy and Moore is too absurd to think of. When they got to the sugar corner, in the east line of the Moore they must have talked politics, quarreled, fought, and then some ran north and some ran south, for the whole evidence shows this line of 1792 extended for miles, both north and south.

8. There was no evidence that the Betz tracts were ever run. The Henry Betz called for a post at the northeast corner of the Moore. See connected draft No. 3. The witnesses all testified that a mark made in July would show a split in the grain. The marks on this line did not show this. It was a plain 1792 line. The presumption was that the east line of the Moore was adopted for the west line of the Betz, and not re-marked. The directions were not to re-mark, but to adopt: *12 Wrt., 38.* "In *Covert* vs. *Irwin*, *3 S. & R., 288,*

it was ruled, that when a new survey is made, calling for the lines for an old survey, there is no occasion to mark the lines anew. There is not only no occasion to mark the lines anew. There is not only no occasion for it, but it is obviously improper; as double marks are apt to make confusion, and the new survey is as well identified by referring to the old lines as if each boundary tree was remarked over again:" *Caul* vs. *Spring, 2 Watts, 395.* The evidence showed it was not the custom to re-mark, and it has been decided at least twenty times that old lines should be adopted as new marks to avoid "confusion and perhaps fraud." The Moore, Cooly, Hardy and Seely were surveyed in a block. See Appendix, 127, and connected draft No. 3. Every surveyor called said the Cooly was located in 1792. This was shown by the marks on the trees, and by the three creeks which crossed this east line. See draft No. 3. "It is said the Stembech was a chamber survey. We see no evidence of it. If lines are now upon any part of the block to which it belongs, (and that was unquestioned,) then the Stembech was from the time of its return into the land office an actual appropriation of the ground, for marks upon any part of the block belongs to each tract of the block:" *4 P. F. S., 198.* Myer, Spaulding and Walker, all experienced surveyors, who were called by the plaintiff, testified the east line was run in 1792. They also testified that the hemlock was marked for the northeast corner of the Moore. The defendants called but two surveyors, Alden and Trescott. They both swore the line east of the Moore was a 1792 line; that the hemlock was marked for a corner in 1792. The Court was as full of theories for the defendants as they were of excuses. They claimed that the west line of the Cooly, which is also the east line of the Irwin, was the Broadhead line; that this line came north to the hemlock sapling corner, which is the northeast corner of the Irwin; that it extended west across the Moore to the sugar corner; that it then ran north along the west of the Betz, east of the Govet, &c.; that it was a 1792 line. The Court presents this

to the jury in order to explain away the 1792 line we showed west of the Moore. Now, when we claim that this line east of the Moore locates it, then his Honor says, "It may be difficult to say whether it was surveyed July, '93, or Nov., '92." This was enough to make a man, who had driven oxen, express himself *emphatic.*

9. This instruction left but a single question for the jury; did the draughtsman make a mistake in putting the Betz tract on as calls on the east. It was put sharp, and ended with the words, "but it is his mistake." We frankly admit that we do not see how a draughtsman could make such a mistake. It would be still more difficult to make such a mistake, and still have the Betz tracts just where they belong. We admit still further *if a* "RETURN OF SURVEY" *calls for adjoining tracts of land for which no* "APPLICATION" *had been filed or made, nor* "WARRANT" *applied for or issued, nor* "LOCATION" *established until after such survey shows to have been returned, then a circumstance would appear which should be explained.* A deputy surveyor has power to add a line; change a line; add a call; erase a call, or make a re-survey at any time before *making his return. Until* it is returned it is entirely under his control: after the *return* his authority has ended. "In making an official survey intended to adjoin an old survey, if by mistake it does not adjoin, the error may be corrected at any time before the survey be returned:" *4 W. & S., 348.* "*After* the return of survey, nothing but an order of re-survey could order an enlargement or diminution of it. The authority of the deputy was exhausted by the return:" *4 Wrt., 267.* "The presumption that the survey was made as returned stands until it is overthrown by facts:" *Ibid., 268.* The evidence shows that George Moore paid all the fees and moneys he was required to pay to perfect his title. Why, or how the surveyor came to put the Betz on for calls we do not pretend to tell. George Moore may have seen the return the deputy was about to make and expressed dissatisfaction. The surveyor may have said, well I have since located the

Betz tract on the east. I will put it on for a call, and this will help you to find your tract. Again the Surveyor General may have demanded the deputy to make his return more explicit, and for this reason the call was added. It may be that the Joseph Betz and Henry Betz were applied for at the same time the Moore application was made, and that the Betz applications were for lands lying directly east of lands granted to George Moore. It is more than probable that before the deputy returned the Moore he had located the Betzs', and for the purpose of making his work complete put them in for calls. "With respect to the execution of lines, etc., the practice had been for the surveyor to run and mark the boundaries on the ground and afterward calculate the contents. They would then add to or diminish the quantity, etc., and in case of great mistake make a re-survey. After the return of the survey in the office of the Attorney General the lines could not be extended without a new warrant, the former being *functus officio*:" *3 Y., 401; 4 W. & S., 75-6; 2 W., 400; 7 Wrt., 197; 4 W. & S., 348.* If the deputy could do all this he certainly could add a call. "*Every presumption is in favor of a draft of survey certified by the proper officer. It is powerful evidence that a survey was fairly, regularly, and legally made: 3 Y., 71; 9 P. F. S., 164.* (Opinion by his Honor, now C. J.) Again we say, this instruction made the calls in the returns paramount to the marks on the ground which is clearly error: *15 P. F. S., 416.* "The marks on the ground is the original; the draft is no more in fact than the evidence of it, which from the nature of the thing is the evidence until corrected by the *original which is the work on the ground. The cases to prove this are too numerous for citation here*:" *Ibid., 418.* "All that the learned judge said upon the strong presumption in favor of the regularity of these surveys, and that they were actually made upon the ground *either by original or legally adopted lines was very proper and necessary*:" *8 P. F. S., 290.* "It would be the height of injustice to affect an honest claim to lands by the oversight of a survey or in making

his return. Such return is but evidence of the survey. What has been done on the ground is the real survey, and has been often so determined:" *3 Y., 582.* "Seeing the Court undertook to refer in their charge to the jury to some of the evidence and the circumstances testified to by the witnesses, it would have been right, in order to prevent the jury from being misled to have brought everything to the notice which had any bearing upon that question:" *1 W. & S., 82.* The evidence showed beyond a question that the Moore was located on the 22 Nov., 1792, or one day after the return shows it was surveyed. The Robert Irwin was surveyed Nov. 22, 1792. The defendants proved this, and so did the plaintiff. This was not only undisputed, but admitted. A connected draft from the land office of the Robert Irwin and the Andrew Tybout was put in evidence, (see No. 2,) and this draft calls for the George Moore on the east, as a call for the Irwin. It also shows that the "Hem. Sap. cor.," the northeast corner of the Tybout is in the west line of the Moore. It also shows that the Moore does not corner there, but that it extends north, just as plaintiff surveyors found it. It was decided unfair for the Court not to call the attention of the jury to this after what was said about the call on the east. If the Court had left out some of the repetitions about the east call, and mentioned this just once, we should have felt differently, and the verdict would doubtless have been for the plaintiff. When the evidence closed the plaintiff had a powerful strong case. His was the older title; this was not disputed. He put in evidence a warrant for the land in dispute, which was regular; a return of survey duly certified which was regular; a patent from the Commonwealth, which was regular; and followed this by a perfect chain of title. He then called the surveyors who located his tract by marks on the ground corresponding with his survey, all of which was swept from him by the charge of the Court as clean as if a western cyclone had done it. Nowhere in the entire charge does the Court even intimate that there is a legal presumption in favor of the plaintiff.

10. The Flowers map showed that the George Moore ran north just as we claimed. The interference was plainly indicated; see Flowers' map. The Broadhead map showed the interference also. The line north from the hem. sap. cor. was indicated by a dotted line. Mr. Powell had almost entirely erased this line. (See his testimony, page 238, in the Appendix.) The defendants showed nothing to justify the Court in submitting the question of "chamber survey." The defendants made no showing such as is required to make a chamber survey. They did not show that the application for the Moore was faulty; they did not question the warrant or return. The plaintiff showed warrant, survey, patent, east line, west line, north line 1792; that the Irwin was located on the west and called for the Moore; that the Cooley was located on the south, and called for the Moore; that these tracts were located respectively, the Cooley the same day as Moore, the Irwin next day; that the Temple, which is mentioned in our warrant, was located east of the Moore, and one day before. Under this showing the plaintiff was entitled to the verdict.

Upon the motion for a new trial, which the court refused, the plaintiff presented to the court the extract from the "List of returns," which appears at the last of the Appendix. The return of the Cooley was also presented at same time. The first shows that the Betts, Cooley, Irwin, &c., were all returned on the same day, to wit: April 16, 1794.

D. C. DEWITT,
Attorney for Plaintiff.

In the Supreme Court of the United States.

No. 1084. October Term, 1885.

SCHRAEDER MINING AND MANUFACTURING COMPANY, Plaintiff in Error,

vs.

ELISHA A. PACKER.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Brief of D. C. DEWITT and C. H. AKMES, Attorneys for Defendant in Error, on Motion to Dismiss or Affirm.

JUDD & DETWEILER, PRINTERS.

Service of a copy of within motions, notice and brief on me this, the 27th day of March, 1886, is hereby admitted.

JNO. F. SANDERSON,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 1084.

SCHRAEDER MINING AND MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

ELISHA A. PACKER.

Now comes the above named Elisha A. Packer, by D. C. DeWitt and Charles H. Armes, his attorneys, and moves—

First. That the writ of error be dismissed, because no sufficient security bond has been given to entitle the plaintiff in error to sue out said writ, the only bond found in the record executed by the plaintiff in error being one which is uncertain and indefinite as to the judgment to which it may pertain, and uncertain and indefinite as to the court and the cause in which it was made.

Second. The defendant in error further moves that the judgment of the circuit court be affirmed, because the questions raised are trivial, and it is manifest that the writ of error was sued out for delay only.

D. C. DEWITT,
C. H. ARMES,
Attorneys for Defendant in Error.

To JOHN F. SANDERSON, Esq., Towanda, Penna.,

Attorney for the above-named Plaintiff in Error.

SIR: Take notice that the foregoing motions will be called up and submitted to the court on Monday, the 19th day of April, A. D. 1886.

D. C. DEWITT,
C. H. ARMES,
Attorneys for Defendant in Error.

THE CASE.

The parties to this suit are owners of contiguous timber lands. The plaintiff below (the defendant in error here) owned a tract which was surveyed in 1792, in the warranty name of George Moore (printed Record, pp. 24, 25), and the defendant below (the plaintiff in error here) owned an adjoining tract, surveyed in 1794 in the name of Andrew Tybout. (Rec., p. 27.) These surveys lapped or interfered, so that the latter covered 320 acres of the Moore tract. (Rec., p. 34.)

The defendant below removed the timber from this 320 acres, and the plaintiff below, as owner (under mesne conveyances), sued in trespass, in the year 1877, in the court of common pleas of Bradford county, Pennsylvania, to recover damages. (Rec., p. 5–6.) The pleas were *not guilty* and *liberum tenementum*. (Rec., p. 34.)

The case was tried in the court of common pleas, where a verdict and judgment were rendered for the defendant below. (Rec., 1.) The supreme court of the State reversed that judgment on proceedings in error, and sent back the case for another trial. (Rec., 2.) Another trial was had, which re-

sulted in a verdict for the plaintiff in the sum of $8,900. The judge set this verdict aside, and granted a new trial. Another trial was then had, which resulted in a verdict for the plaintiff for $10,101.60.

The judge thereupon ordered that unless the plaintiff remit one-half of the amount of the verdict a new trial be granted. The remittitur was not made, and the judge set aside the verdict and ordered a new trial. (Rec., 2.)

The plaintiff below, who was a resident and citizen of the city and State of New York (the defendant below being a corporation of the State of Pennsylvania) thereupon caused the action to be removed to the United States circuit court for the western district of Pennsylvania (Rec., p. 8–12), on the ground of prejudice or local influence, under paragraph third, section 639, Revised Statutes of the United States.

The defendant below moved to remand to the State court—1st, on the ground that it was too late to remove (Rec., p. 13); and, 2d, that the parties plaintiff were not all citizens of another State. (Rec., p. 13.)

The court refused to remand, and the defendants excepted. (Rec., p. 16.)

The defendant then obtained leave to file a further plea (Rec., p. 3), and thereupon filed a *plea of the statute of limitations;* which said plea the court ordered to be stricken out as having been inconsiderately allowed to be filed. (Rec., p 17.) The court subsequently granted a rule to show cause why the said defendant should not be allowed to plead the statute of limitations. The rule was discharged. (Rec., p. 3.)

The case was tried in the United States circuit court before Mr. Justice Bradley and the circuit judge (McKenna) and a jury.

The plaintiff deduced title through mesne conveyances under said warrant of survey of 1792. (Rec., p. 24.) The defendant offered to give evidence to show that said Moore warrant was not actually surveyed upon the ground and the locations made according to the return of survey; to which offer objection was made by the plaintiff on the ground that, twenty-one years and upward being elapsed from the date of the Moore survey, there was a presumption, *juris et de jure*, that the said survey was made as returned.

The court sustained the objection, and the defendant excepted. (Rec., p. 31.)

The evidence of the defendant tended to show that in the year 1866, before any dispute arose about said boundary, a line was run and painted by a surveyor, which line one Jacob De Witt, as attorney for the plaintiff, not knowing where the boundary was, assented to. (Record, bottom page 31 to 33.) Upon this subject the record shows as follows:

"Upon the subject of the alleged agreement as to the painted line the court charged the jury—

"1. The contention of the defendant that its title to the land in dispute became established and valid as between itself and the plaintiff by the consent and acquiescence given by Jacob De Witt, the plaintiff's agent, to the painted line made by Mr. Walker in 1866 cannot be admitted.

"The assent given to that line by Jacob De Witt was not given to it as a compromise line yielded to for the purpose of ending a dispute or difference between the parties, for there was no such dispute or difference. They had no knowledge that the George Moore survey belonging to the plaintiff interfered with the Andrew Tybout survey of the defendant's predecessors and grantors.

"The intimation thrown out by Mr. Walker, in presence of Jacob De Witt (if such was the fact), that there was some

interference on the Tybout tract, was not sufficient notice of the interference that actually existed, especially as Mr. Walker immediately added that he had put the line where he thought it ought to be and where it always had been.

"No question of title had arisen between the parties, and this observation of Walker, if made at all, was not such as to awaken De Witt's mind to the character of the conflict that actually existed between the titles.

"2. It cannot be conceived for a moment that if the plaintiff or his agent had known of this interference (his being the superior title) he or the agent would ever have consented to the line that was run.

"If with full knowledge of his rights he had consented to it, it would have presented a different question.

"But there is no evidence that he or his agent, or those acting for the Schrader Company, had any knowledge or notice of it whatever.

"It was a clear mutual mistake; one that ought not to conclude or bind the plaintiff to the loss of his land.

"3. It is a question of error and mistake. It is not a question of consentable or compromise line at all.

"In our opinion, there is not sufficient evidence in the case to be submitted to the jury for them to deliberate on the question whether the painted line was a compromise line knowingly adopted by the parties so as to bind them in reference to the now acknowledged interference of the surveys.

"4. But, in our view this case, in which a boundary line has been adopted by mistake, has nothing of license in it. There was no intention to give a license. The transaction has not a single element of license. It was simply a mutual mistake in the location of the line which was supposed to separate the respective lands of the parties.

"5. We charge you, therefore, that if the painted line was assented to by the plaintiff's agent in ignorance of the true boundaries of the plaintiff's land, and in ignorance of the interference between the Moore and the Tybout surveys,

then the defendant was not protected by that line from the action of trespass in taking and carrying away the timber from the plaintiff's land, and as there is no sufficient evidence to show that the plaintiff or his agent knew the true boundaries, and knew of the interference between the said surveys at the time of the cutting, you are to presume under the circumstances of the case that they were ignorant of the same."

Defendant gave in evidence a deed in fee from the plaintiff below to said Jacob De Witt for the *locus in quo*, dated November 2, 1869, filed as Exhibit Q (Record, p. 33).

In rebuttal, the plaintiff gave in evidence an agreement between himself and said Jacob De Witt, showing said deed to have been coupled with a defeasance (Record, p. 33). (See Exhibit "R.") In connnection with this paper plaintiff testified that said De Wit did not comply with the conditions therein expressed until about October 1, 1870, at which period he sold the land to said De Witt (Record, p. 33).

Upon this point the court instructed "the jury that the plaintiff, if entitled to recover at all, was entitled to recover damages for all cutting and carrying away of timber from the disputed premises up to the time that he actually sold the property to Jacob De Witt, which according to his testimony, was the first day of October, 1870."

The defendant asked certain instructions to the jury, which the court refused to give (Record, pp. 39, 40, 41).

The jury rendered a verdict for the plaintiff below and against the defendant below in the sum of $8,000 (Record, p. 21), upon which judgment was entered June 5, 1885. Defendant filed seventeen assignments of error, raising four questions of law (Record, p. 52); and sued out this writ of error June 11, 1885, removing the cause to this honorable court.

Argument.

First. The security bond (Record, p. 23) executed by the plaintiff in error—like the bond in the case of New Orleans Insurance Co. *vs.* Albra Co., 112 U. S., 506—does not specify the term at which the judgment was rendered, and therefore does not sufficiently describe the judgment, nor does it describe any certain case in any court at the time it was made, executed, or approved. The bond is uncertain and defective in other respects. The caption is as follows:

"*Bond.*

"Supreme Court of the United States.

"Schrader Mining and Manufacturing Company

vs.

"Elisha A. Packer."

To say that this bond was made in the circuit court is to contradict, alter, and change the instrument, which on its face is entitled in the "Supreme Court of the United States."

The bond, on its face, purports to have been made in an *original cause* in this court, where the Schrader Company is plaintiff and Packer is defendant. The plaintiff in the caption is not the party named as plaintiff in the body of the bond, nor is the party named as defendant in the body of the bond the same as the defendant in the caption. The instrument on its face describes two cases—one in this court, wherein the "Schrader Mining and Manufacturing Company" is the plaintiff, and the other in the circuit court of the United States for the western district of Pennsylvania.

Second. In support of the motion to affirm, the counsel for the defendant in error respectfully submit:

The first error assigned, to wit, "the court erred in refus-

ing to remand the cause to the State court." (See printed page of record 52 for the error, and 16 for the exception and reasons.) This case was removed under paragraph 3 of section 639, Revised Statutes.

The first reason, "that the application for the removal was not made in time," has been decided in Hess *vs.* Reynolds, 113 U. S. Rep., at page 73. In this case Mr. Justice Miller says: "An application for removal under that clause is in time if made before the trial or final hearing of the cause in the State court." The second reason is sustained by no evidence. The petition for removal (see printed page 8) is conclusive against it.

The second error assigned is not based upon any exception. (See error, printed page 52.) It is as follows: "The learned court erred in refusing to allow the defendant below to plead the statute of limitations." All the record shows may be found on pages 3 and 17 of the printed record. The rule was discharged, but whether by consent or otherwise, the record does not show.

The assignments of error from 3 to 7 (see printed pages 52, '3, '4, '5, '6, and '7) raise but a single question, which is, Could the defendant below contradict the plaintiffs return of survey? If it could, there is merit in these assignments; if if it could not, they need no farther consideration. This question is decided by the supreme court of Pennsylvania in this very case. (See Packer *vs.* Schader Mining and Manufacturing Company, 1 Out., page 379.) Mr. Justice Bradley followed this opinion closely, as he is directed to do. by the law as settled in Leffingwell *vs.* Warren, 2 Black., page 599.

The opinion of the supreme court of Pennsylvania in this case is the last decision on the question, and that the

question was correctly disposed of is shown in the clear charge of Mr. Justice Bradley, when the whole charge is considered. (See Record, page 33, beginning at the bottom and continuing to bottom of page 35.)

The assignments of error from 8 to 15 (see printed pages 57, '8, and '9) raise but a single question, and may be considered together. The defendant below offered to show that a compromise line had been agreed upon by the parties which would give it the land in question. After hearing all the testimony the defendant had to offer, the court considered it not sufficient, and refused to submit the question to the jury. In order to understand and dispose of these assignment of errors, it is only necessary to read the charge of Mr. Justice Bradley, beginning at the bottom of printed page 35 and including balance of the charge.

The two remaining assignments of error (see printed page 59) may be considered together. They raise the question that no timber after November 2, 1869, could be recovered for. The deed referred to will be found on printed page 49. The deed was not put on record till 1872. (See bottom page 50.) The purpose for which the deed was given is shown in Exhibit R, printed page 51. That the agreement was not complied with, and that Packer did not sell the land till about the 1st of October, 1870, see answer to defendant's points on printed page 59.

The charge of the court was therefore right.

We respectfully submit that if the writ be not dismissed the judgment should be affirmed.

D. C. De Witt,
C. H. Armes,
Attorneys for Defendant in Error.

IN THE SUPREME COURT

OCTOBER TERM, 1885.

No. 1084.

THE SCHRAEDER MINING AND MANUFACTURING CO., PLAINTIFF IN ERROR,

vs.

ELISHA A. PACKER.

Reply of Defendant in Error on Motion.

The motion of the plaintiff in error for leave to file an additional bond, ought not to prejudice the pending motion to affirm.

In the case of Micas *v.* Williams, 104 U. S. 556, where there was a motion to dismiss or affirm and affidavits were subsequently filed showing sufficiency of amount to give jurisdiction, this court overruled the motion to dismiss, and said, "There was on the record as it stood when the motions were made, at least sufficient color of right to a dismissal to justify us in entertaining with it a motion to affirm in accordance with the provisions of Rule 6, par. 5. *Motion to affirm granted.*"

So in this case: There was on the record when the motion to dismiss or affirm was made, the defective bond, giving color of right to a dismissal, under the ruling of this court

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IN THE SUPREME COURT OF THE UNITED STATES.

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So in this case: There was on the record when the motion to dismiss or affirm was made, the defective bond, giving color of right to a dismissal, under the ruling of this court

in the case of New Orleans Ins. Co. *v.* Albro Co., 112 U. S., 506. A copy of the motion to dismiss or affirm, together with a copy of the brief in support thereof (and notice that the motion would be called up and submitted to the court on the 19th of April, 1886), was served on counsel for the plaintiff in error on the 27th of March, 1886, and the original motion, in writing, was filed in this court March 29th, 1886. The rule concerning such motions *was fully complied with before any proceeding was begun for the filing of a new bond.*

The statement in the brief filed for the plaintiff in error that "simultaneously with the service of defendant's motions plaintiff in error served notice of motion for leave to file an additional bond," &c., is calculated to give the court an erroneously impression. An affidavit, herewith, filed will show that the motions to dismiss or affirm were served early in the forenoon, and the motion of the plaintiff in error was served late in the afternoon of March 27th, 1886. We do not claim that counsel intended to mislead the court.

A glance at the assignments of error will show that the maps mentioned in the brief of counsel for plaintiff in error cannot be of service to any one on any hearing of this case in this court.

For a full reply to the argument of counsel for plaintiff in error we append hereto a copy of the case in 1st Out., 379.

Respectfully submitted,

D. C. DeWitt,
C. H. ARMES,
Attorneys for Defendant in Error.

In 1 Out., at page 379, is the following:

PACKER, et al
vs.
SCHRADER MINING and MANUFACTURING CO. } Supreme Court of Pennsylvania.

1. An official surveyor, who, in making a survey pursuant to a warrant, adopts the lines of older or contemporaneous surveys, as the lines of the one upon which he is engaged, will not be deemed to have made a chamber survey.

2. Where a return of survey is made and accepted, without a caveat, a prima facie presumption arises, that the survey was actually made upon the ground, but for twenty-one years after the return such presumption is capable of being rebutted by proof that the survey was but a chamber survey. After the lapse, however, of twenty-one years, the presumption that the survey was properly made on the ground becomes fixed and absolute, and cannot be rebutted by the evidence of any fact, however obvious.

3. Ormsby v. Ihmsen, 10 Casey 462, followed and approved.

4. When the regularity of the survey is by this means legally fixed and absolute, the only question remaining for a jury is to determine whether such lines, adjoinders or other marks, can be found upon the ground, as will enable them to determine with reasonable certainty the location of the tract of land in dispute.

5. Where in such case the tract concerning the location of which the question has been raised, and another tract were located by the same surveyor, the return of survey of the former describing it as having been warranted and surveyed before the latter, but the return of survey of the latter having been made before that of the former, the adoption in the return of survey of the former of the latter tract as an adjoinder can have no other effect than to aid in the location of the former tract.

March 11th 1881. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY, STERRETT and GREEN, JJ.

Error to the Court of Common Pleas of Bradford county: Of July Term 1880. No. 41.

Trespass *quare clausum fregit* by E. A. Packer et al. against The Schrader Mining & Manufacturing Company et al. for timber felled and converted in 1867, 1868 and 1869, upon part of a tract of unseated land in the warrantee name of George Moore. The defendants pleaded not guilty and *liberum tenementum.*

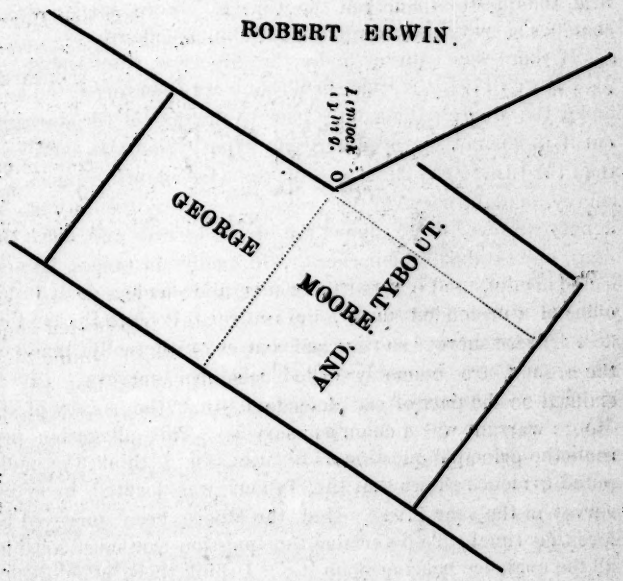
On the trial, before Morrow, P. J., the plaintiffs showed the following title: April 27th 1792, warrant to George Moore 400 acres of land adjoining or near to lands this day granted to

Samuel Temple in the county of Northumberland. Surveyed 21st of November 1792. Returned, endorsed, &c., January 8th 1795. February 24th 1795 patent, Commonwealth of Pennsylvania to George Moore for a certain lot of land called "Greenfield," situate on waters of Towanda creek, Luzerne county, 375 acres and allowance of six per cent. for roads; surveyed in pursuance of warrant of April 27th 1792, to Samuel Wallace, in consideration of moneys paid by George Moore. The plaintiffs deduced title to themselves by mesne conveyances, in which the tract was described, in 1839, as follows: "Situate on the waters of Towanda creek, Luzerne county, beginning at a post, thence by land of Joseph Bets and Henry Bets, north 29° east, 318 perches to a hemlock, thence by vacant lands, north 61° west, 200 perches to a post, thence by the same and land of General Bradhead, south 29° west, 318 perches to a post, and thence by land of Samuel Cooley, south 61° east, 200 perches to the place of beginning, containing 375 acres and an allowance of six per cent. for roads." The plaintiffs proved the payment of taxes and redemption from tax sales of the George Moore tract.

The defendants claimed that the land on which the alleged trespass was committed was part of a tract of unseated land in the warrantee name of Andrew Tybout, containing 409 acres, to which, it was admitted the defendants had title.—There is an interference of about 250 acres between the Moore and Tybout tracts. The defendants claimed that the George Moore tract was never surveyed on the ground, but was a chamber survey. They put in evidence warrant, February 15th 1794, to Andrew Tybout; certified copy of return of survey, surveyed March 24th 1794, survey returned June 25th 1794. Also, patent, June 27th 1794, to Daniel Brodhead, granted in consideration of moneys paid by Tybout for tract described as follows: "Beginning at the hemlock sapling, thence by land of Robert Erwin, north 40° west, 100 perches to a post, thence by land of John Barron, Jr., north 29½° east, 190 perches to

a post, thence by land of William Gobett, south 61° east, 320 perches to a hemlock, thence by lands of Drinker & Co., south 29½° west, 220 perches west to a sugar, and thence by old surveys, north 61° west, 225 perches to the beginning, containing 409¼ acres and an allowance of six per cent. for roads."

The following plan shows the interference:



It was admitted that the taxes were paid upon the Tybout tract by the defendants and their predecessors in title, from

the organization of Bradford county to the beginning of this suit. Much evidence was given on both sides on the question whether the George Moore tract was actually surveyed and marked on the ground in 1792, or whether it was a chamber survey. The evidence showed that the Tybout tract was actually surveyed on the ground in 1794. It did not appear that any caveat had been filed against the location of the George Moore tract, or that the question of its location, or of its interference with the Tybout tract, had been raised by any legal proceedings prior to the bringing of this suit.

The court submitted to the jury, as the principal question of title, the question whether the George Moore survey was a chamber survey, and charged, inter alia, as follows:

"If there was a survey under the Moore warrant before the 24th March 1794, the time the Tybout was surveyed, the title under the Moore patent dates back to the date of the warrant, but if it was not surveyed until after the Tybout was surveyed, then the title to the land was in the defendant. I mean by survey, actual survey on the ground. It was the duty of the deputy surveyor to go upon the ground, run and mark the lines, and establish the corners. In many instances, he neglected his duty and omitted to do this, and made a draft in his office of a pretended survey, and returned it into the land office. These surveys so returned, but never actually made on the ground, are commonly called 'chamber surveys.' It is claimed on the part of the defendant, that the survey of the Moore warrant was a chamber survey. This allegation presents the principal question as to title; for I think the undisputed evidence shows that the Tybout was located by actual survey in the year 1794. Had the Moore been surveyed before that time? To determine this question you must consider all the evidence bearing upon it. I think there is no dispute but that the line for a long distance, both north and south of the hemlock corner, was run upon the ground in the year 1792. It is not enough that he was there to survey other warrants that adjoin it. Was he there, and did he survey the Moore warrant? * * *

"The evidence shows that the Joseph Betz and Henry Betz are on the east. Both were warranted in 1793, and surveyed July 4th 1793. This fact may bear upon questions as to the date of the survey of the line south from the hemlock, and of the marks found upon that corner; for it may be difficult to say where a line was surveyed July 4th 1793—whether it was surveyed in 1792 or 1793. The official copy of the Moore calls for the Beltz on its east. This may be a mistake of the draughtsman at the land office; but is it his mistake? Has it not a tendency to show a chamber survey—one made after the Betz had been surveyed and returned to the land office? It (George Moore) calls for vacant land on the north. The Gobett tract is there, but it was not warranted until 1794. The call, therefore, is correct, and ought it not to have called for vacant land on the east if it had been actually surveyed November 21st 1792? It was vacant land on its east November 21st 1792.

The Betz warrants had not then been issued, and unless the draughtsman at the land office made a mistake, they could not have been put on as calls, because they did not then exist.

"Again, it is proper for the jury to take in consideration the course of streams as indicated by the official draft, to determine whether the Moore was surveyed in 1792. (The attention of the jury was called to the water-courses as indicated on the different maps, and also where the Schrader creek crossed the west line of the Moore.) To determine whether the Moore tract was actually surveyed in 1792, the original marks on the ground, if any, are the strongest and best evidence. If it is doubtful whether the marks were made at the time, then the jury should consider the calls and watercourses. If the official drafts show a correct location of the watercourses, it is evidence which may have a tendency to show that there was an actual survey. If, after examining this evidence, there is still doubt, it is proper to consider the old maps in evidence—Broadhead's map of 1799, and Flower's map of 1828. It is proper to consider these maps as parts of the evidence. They show where the Tybout was located then, to wit, 1799 and

1828. The Moore tract is not indicated on either map, except as south of the Tybout.

"If, after considering all the evidence, you find that the George Moore was not surveyed in 1792, and find that Tybout was surveyed in 1794, and before Moore was surveyed, that ends the case, and your verdict should be for the defendants."

Verdict and judgment for the defendants. The plaintiffs took this writ of error, assigning for error the charge of the court as above quoted.

D. C. De Witt, for plaintiff in error.

Sanderson (with whom was *Overton* and *Davies & Carnochan*,) for the defendants in error.

Mr. Justice Gordon delivered the opinion of the court, May 2d 1881.

The question involved in this case is a very simple one—one of location only. The Moore survey was older than the Tybout. It was regularly returned and accepted, and was also patented. If, therefore, there were any marks found on the ground, or any adjoinders called for by the survey, as returned to the land office, by which the position of the tract could be ascertained, this controversy ought to have been determined by the jury in favor of the owners of this survey.

We repeat, the question was one simply of the location of the Moore warrant. Was there a corner or line found on the ground which was a corner or line of this tract? If so, the question was resolved; for from either the location of the warrant could be readily determined by simply following the courses and distances called for by the survey. So, if there were known adjoinders, the location could, in like manner, easily be established.

But the court below, departing from this simple proposition, erred in two principal points: 1. In submitting to the jury the question whether or not the Moore survey was a chamber survey; 2. In saying to the jury that it was not enough that the surveyor was on the ground to survey the Moore warrant.—

This, of course, meant that he could not adopt the lines of older or contemporaneous surveys as the lines of the Moore tract. But in Parshall v. Jones, 5 P. F. Smith 153, it was said, following McRhea v. Plummer, 1 Binn. 227, and Caul v. Spring, 2 Watts 390, that the lines of older surveys may be adopted for a later warrant, without re-running or re-marking them, and that such a survey is not a chamber survey. To us, indeed, it seems strange that a proposition so obvious and reasonable should ever have been doubted; for as it is admittedly improper to re-mark old lines when adopted for a new survey, why should they be re-run? Certainly, for the purposes of location, this would be an unnecessary labor, and to us no reason occurs for the enforcement of such a work, except to compel the deputy surveyor to earn his fees.

A chamber survey is one that has never been made upon the ground, but where a survey has been returned and accepted without a caveat, the presumption, after twenty-one years, as was held in Ormsby v. Ihmsen, 10 Casey 462, is *juris et de jure* that it was made on the ground. In other words, this presumption is one that no fact, however obvious, can rebut. In the case just cited the court below, whilst holding that, after the period mentioned, the survey, returned by the proper officer, was by law presumed to have been run upon the ground, nevertheless instructed the jury that this presumption might be rebutted by positive proof. This was held to be error; that such was not the nature of the presumption attending a survey returned without objection for more than twenty-one years; that the presumption was absolute in its character—a legal conclusion. A like result was arrived at in the cases of Lambourn v. Hartswick and Mock v. Astley, 13 S. & R. 113; 382. Justice Duncan, who delivered the opinions in both these cases, in substance said that, prima facie, a survey was made as returned, and that it was the business of the adverse party to disprove it; but that, where time, analogous to the Statute of Limitations, had run, where the owner had continued to pay the public taxes, and where there had been no caveat, a

presumption of law ought to arise in favor of the regularity of the survey.

Following these cases, Huston, J., in Norris v. Hamilton, 7 Watts 91, held "that after a survey had been returned more than twenty-one years, the presumption that it had been legally made became a violent presumption, or as is said in the last case, not to be contradicted." The same idea is repeated in Bellas v. Cleaver, 4 Wright 267, per Thompson, J.

How, then, in view of these authorities, does the case in hand stand? The Moore warrant purported to have been surveyed on the 21st of November 1792, and was duly returned, accepted and patented; this final act of the land office occurring on the 24th of February 1795. Then, for twenty-one years after the date of this survey, the prima facie presumption was in favor of its correctness. Nevertheless, within that time, this presumption was prima facie only, and might have been rebutted by those interested in the interfering Tybout survey, by a caveat or in an action of ejectment. Neglecting this, allowing the survey to remain unquestioned for the period above mentioned, the presumption became absolute and was no longer open to attack.

The regularity of the survey being thus legally fixed and absolute, it but remains for a jury to determine whether, upon the ground, such lines, adjoinders or other marks can be found as will, to a reasonable certainty, determine the location of the plaintiff's claim.

Finally, as the Moore and Betz warrants were located by the same surveyor, and as the former was not returned until after the survey of the latter, the adoption of the junior warrants, as adjoinders of the senior survey, ought to have no other effect than to help in the location of the older warrant.

The judgment of the court below is reversed, and a new *venire* is ordered.

Affidavit.

Supreme Court of the United States, Oct. Term, 1884.

SHRAEDER MINING & MANUFACTURING CO.
vs.
E. A. PACKER. } No. 1084.

D. C. Dewitt, being duly sworn according to law, says he served for the defendant in error upon the attorney, to wit, John F. Sanderson, Esq., of the plaintiff in error copies of the defendant's motion, brief, and notice upon the 27th day of March, 1886, before the hour of 10 o'clock a. m. of said day; that the notice of motion for leave to file a new bond was not served till after 4 o'clock of the afternoon of said 27th of March, 1886, that said notices were served on the same day, but not at the same time of day; that they were not served simultaneous, according to the use of the word simultaneous.

D. C. DEWITT.

Sworn and subscribed before me April 17th, A. D. 1886.

[SEAL.] GEO. S. ESTELL,
Notary Public.

FILED
APR 19 1886
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

No. 1084 October Term, 1884.

SCHRAEDER

MINING AND MANUFACTURING COMPANY

VS.

ELISHA A. PACKER.

MOTION FOR LEAVE TO FILE AN ADDITIONAL BOND.

BRIEF OF PLAINTIFF IN ERROR in Opposition to Motions of Defendant in Error to Dismiss and Affirm.

JOHN F. SANDERSON,
ATTORNEY FOR PLAINTIFF IN ERROR.

Reporter-Journal print, Towanda, Pa.

Supreme Court of the United States.

OCTOBER TERM, 1885. No. 1084.

Service of the following motion and notice on me this the 27th day of March, 1886, is hereby admitted.

D. C. DEWITT,
Att'y for Deft. in Error.

JOHN F. SANDERSON,
Attorney for Plaintiff in Error.

To D. C. DEWITT, ESQ., TOWANDA, PA.,
Attorney for the above-named Defendant in Error:

SIR:—Take notice that the foregoing motion will be called up and submitted to the Court on Monday, the 19th day of April, A. D., 1886, and also that the bond at that

Supreme Court of the United States.

OCTOBER TERM, 1885. No. 1084.

SCHRADER MINING AND MANUFACTURING COMPANY, *Plaintiff in Error.*

vs.

ELISHA A. PACKER, *Defendant in Error.*

Now comes the above named Schrader Mining and Manufacturing Company, by John F. Sanderson, its attorney and moves—

That the above named Schrader Mining and Manufacturing Company be granted leave to file the bond now produced and shown to the Court here, in addition to and for the purpose of obviating any objection there may be on account of any formal defect in, the bond now on file in this case, given by the said Schrader Mining and Manufacturing Company as bail in error.

JOHN F. SANDERSON,
Attorney for Plaintiff in Error.

To D. C. DEWITT, ESQ., TOWANDA, PA.,
Attorney for the above-named Defendant in Error:

SIR:—Take notice that the foregoing motion will be called up and submitted to the Court on Monday, the 19th day of April, A. D., 1886, and also that the bond at that

time to be produced and submitted will be in the form following, and with the same sureties that appear on the original bond filed in the case, who will justify in the same amount.

JOHN F. SANDERSON,
Attorney for Plaintiff in Error.

FORM OF BOND

Supreme Court of the United States.

SCHRADER MINING AND MANUFACTURING COMPANY

vs.

ELISHA A. PACKER

Know all men by these presents that we, the Schrader Mining and Manufacturing Company, Robert H. Sayre, of Bethlehem, Pennsylvania, and Joseph Powell, of Towanda, Pennsylvania, are held and firmly bound unto Elisha A. Packer, of the city and State of New York, in the sum of thirty thousand dollars, to be paid to the said Elisha A. Packer, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this —— day of ———, A. D., 1886.

Whereas the above-named Schrader Mining and Manufacturing Company hath prosecuted a writ of error to the Supreme Court of the United States to number 1084, October Term, 1885, to reverse the judgment rendered in an action prosecuted by the said Elisha A. Packer against the said Schrader Mining and Manufacturing Company in the Circuit Court of the United States holden in the western district of Pennsylvania, to number 45, May Term, 1884.

Now the condition of this obligation is such that if the above-named Schrader Mining and Manufacturing Company shall prosecute its said writ of error to effect, and answer all costs and damages if it fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] THE SCHRADER MINING & MANUFACTURING CO.,

By ROBERT H. SAYRE, *President.*

Attest: JOSEPH POWELL, *Sec'y.*

ROBT. H. SAYRE. [SEAL.]
JOSEPH POWELL. [SEAL.]

SUPREME COURT OF THE UNITED STATES.

NO. 1084 OCTOBER TERM, 1885.

SCHRAEDER MINING & MANUFACTURING COMPANY,

PLAINTIFF IN ERROR,

vs.

Service of the accompanying brief in opposition to motions to dismiss and affirm on me this 15th day of April, 1886, is hereby admitted.

D. C. DEWITT,
Att'y for Deft. in Error.

additional bond which motion is herewith submitted.

The form for the bond originally given, was found in *Abbott's United States Practice, Vol. 2, p. 529.* which form is copied in the note, (1) and was closely followed. The form

Supreme Court of the United States [*if review in that court is sought; if in a Circuit Court, then*]

Circuit Court of the United States for the District of [*naming it.*]

[*Title of the Cause.*]

Know all men by these presents, that we, Y. Z, U. V., and S. T., of

SUPREME COURT OF THE UNITED STATES.

NO. 1084 OCTOBER TERM, 1885.

SCHRAEDER MINING & MANUFACTURING COMPANY,

PLAINTIFF IN ERROR,

vs.

ELISHA A. PACKER,

DEFENDANT IN ERROR.

I.

AS TO THE MOTION TO DISMISS.

The motion to dismiss is upon the ground that the bail bond in error did not set forth the number and term of the judgment rendered in the court below.

"The better practice undoubtedly is to specify the term in describing the judgment, but the omission of such a means of identification is not necessarily fatal, and certainly, before dismissing a case on that account, opportunity should be given to furnish new security."

Per WAITE *C. J., Insurance Co. vs. Albro Co., 112 U. S. 506.*

Simultaneously with the service of defendant's motions, plaintiff in error served notice of motion for leave to file an additional bond which motion is herewith submitted.

The form for the bond originally given, was found in *Abbott's United States Practice, Vol. 2, p. 529.* which form is copied in the note, (1) and was closely followed. The form

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Supreme Court of the United States [*if review in that court is sought; if in a Circuit Court, then*]

Circuit Court of the United States for the District of [*naming it.*]

[*Title of the Cause.*]

Know all men by these presents, that we, Y. Z., U. V., and S. T., of

seems to be subject to the objections made in defendant's brief, p. 7. The bond itself was approved by, and simultaneously with the allowance of the writ of error by Mr. Justice BRADLEY, and it was filed in the Circuit Court in No. 45, May Term, 1884, and is so endorsed, together with the names of the parties to the suit, (Record pp. 24, 60,) it was, by the act of the plaintiff in error, brought into this Court with the transcript, and docketed to No. 1084, October Term, 1885, and the bond sets forth the judgment with a certainty fully equal to that of the writ of error by which the record was removed. (Record p. 60.)

Upon the foregoing it is respectfully submitted that the original bond, if not sufficiently specific upon its face, was made so by being filed, endorsed, attached to the transcript and so docketed in this Court, and that in a suit upon it the

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are held and firmly bound unto A. B., of in the sum of dollars, to be paid to the said A. B., his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this day of , 18 .

Whereas, the above named Y. Z. hath prosecuted a writ of error to the Supreme Court of the United States [*or*, to the Circuit Court of the United States, for the District of [*naming it,*] to reverse the judgment rendered in the above entitled action, by the [*naming the court whose judgment is to be reviewed.*]

Now, therefore, the condition of this obligation is such, that if the above named Y. Z. shall prosecute his said writ of error to effect, and answer all costs, [*or, if a supersedeas is to be claimed,* costs and damages,] if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Y. Z. [L. S.]
U. V. [L. S.]
S. T. [L. S.]

Sealed and delivered in presence of

plaintiff would make his case by putting it in evidence in connection with the record of the judgment and its affirmance, without more.

The motion to dismiss ought not to be entertained, this Court having said that the reason alleged was not a sufficient ground for dismissal, at least without giving an opportunity to correct the security ; because, notice of motion to add security having been given simultaneously with the notice of the motion to dismiss, and the two motions being fixed to be called up and submitted at the same time, the allowance of plaintiff's motion renders the consideration of defendant's unnecessary.

II.

AS TO THE MOTION TO AFFIRM.

1. It Ought not to be Entertained.

The motion to affirm ought not to be entertained for the reasons above stated.

Color of right to a dismissal must appear, or a motion to affirm will not be entertained.

Davis vs. Corbin, 113 U. S. 687.
Whitney vs. Cook, 99 U. S. 607.

As the record stood when the notice of motion to dismiss was given, it is respectfully submitted that no sufficient color of right to a dismissal appeared.

It is plain the transcript has received a microscopic examination in order to found a motion to affirm.

2. As to the First Assignment of Error.

The case of *Hess vs. Reynolds*, decided in October, 1884, (*113 U. S., 72,*) seems to cover the first assignment, and it will not be pressed.

3. As to the Third Assignment of Error.

This relates to the refusal to allow the defendant below to add the plea of the statute of limitations.

The injury complained of by the plaintiff below, who is the defendant in error, consisted in the cutting and removal of certain timber trees, which took place in 1867, 1868 and 1869. (Record pp. 25, 26.) The plaintiff sold his interest in the *locus in quo* and conveyed it by deed dated November 2, 1869, which under the contention of plaintiff below, took effect October 1, 1870. (Record pp. 41, 42.) Suit was not brought until Feb. 26, 1877. (Record p. 4.) No time is laid in the declaration (Record p. 5.)

The refusal to allow the plea of the statute of limitations appears on p. 3 of the Record.

The common law doctrine as to amendments and jeofails prevails in Pennsylvania, modified in some respects by statutes, among which is in force the following section of the Act of March 21, 1806, 4 Smith's Laws, p. 329, 1 Bright. Purd. Dig., 10 Ed., p. 68, title *Amendment.*

1. In all cases where any suit has been brought in any court of record within this commonwealth, the same shall not be set aside for informality, if it appear that the process has issued in the name of the commonwealth, against the defendant, for moneys owing or due, or for damages by trespass or otherwise, as the case may be; that said process was served on the defendant, by the proper officer and in due time; nor any plaintiff nonsuited for informality in any informality in entering a plea: but when, in the opinion of the court, such informality will affect the merits of the case in controversy, the plaintiff shall be permitted to amend his declaration or statement, and the defendant may alter his plea or defence, on or before the trial of the cause; and if,

by such alteration or amendment, the adverse party is taken by surprise, the trial shall be postponed until the next court.

The effect of this Act has been to make amendments which before were discretionary, a matter of right, and the granting or refusing of them the subject of a writ of error.

Peaceable vs. Whitehill, 2 Yeates, 279.
Young vs. Commonwealth, 6 Binn., 88.
Clymer vs. Thomas, 7 S. & R., 181.
Hopkins vs. Mehaffy, 11 Id., 129.
Proper vs. Luce, 3 Penn., 65.
Com. vs. Mechling, 2 W., 130.
Golding vs. Clayton, 1 Browne, 175.

A party may amend upon a second trial, after a reversal of a former judgment, and as often as is necessary.

Lee vs. Wright, 1 Rawle, 149.
Franklin vs. Mackey, 16 S. & R., 117.

4. As to the Third, Fourth, Fifth, Sixth and Seventh Assignments of Error.

These appear on pages 52 to 57 of the record.

The portions of the bill of exceptions embraced in these assignments of error refer to Exhibits L. M. N. O. P. These Exhibits are attached to the bill of exceptions and transcript, and form part thereof. They are not copied or furnished to the Court in connection with the transcript by the defendant in support of the present motion. Without the aid of these Exhibits it is impracticable to present to the Court an intelligible statement of the questions involved relating to the surveys. These assignments are not wholly covered by *Packer vs. Schraeder, 1 Out., 379.* The defendant in error did not raise the questions presented by these assignments, upon his writ in the case cited, but on the contrary expressly conceded the principal points involved in them, and rightly

too, upon principles expressly laid down in *Glass vs. Gilbert, 8 P. F. Smith, 266*, a very important and well considered case. If what the plaintiff in error contends is mere *dictum* in *Packer vs. Schraeder* be considered as decision, that case overrules *Glass vs. Gilbert* and a bead roll of decisions in Pennsylvania from the earliest to the latest, and that without mentioning them, or considering the reasons on which they are founded. But, as before stated, the questions cannot be intelligibly presented without the maps referred to as Exhibits L. M. N. O. and P., as well as the other maps and diagrams referred to as Exhibits in the bill of exceptions, and hence cannot be discussed in this brief.

5. As to the Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Assignments of Error.

These are found on pages 57, 58 and 59 of the record.

They present several kindred questions which arise on facts stated in the bill of exceptions (Record 31, 32, 33,) as follows:

That soon after the purchase by the plaintiff of certain lands which adjoined the Schrader lands on the east for two or three miles or more and included the *locus in quo* he employed Jacob Dewitt as his agent or attorney with reference to his said lands; that as such agent said Dewitt had full power and control of the lands and to protect them from depredations and from any trespasses being committed upon them. Mr. Packer had never seen the lands, and resided in the city of New York, upwards of two hundred miles distant therefrom.

Dewitt also attended to the payment of taxes on the lands and conducted some negotiations for Packer with reference to a proposed sale of them. Packer had no other agent as to the lands. While Dewitt's authority was such the Schrader Land Company, in 1866, contemplated the erection of a saw-

mill and extensive lumbering operations. Its affairs were managed by an executive committee composed of Charles F. Welles, John F. Means, and V. E. Piollet. They determined to establish and paint a boundary line of the Schrader lands as a guard against trespassing upon adjoining owners, and so informed Jacob Dewitt, as agent for Packer. Dewitt was at this time an attorney-at-law, a stockholder in the Schrader Land Company, and was occasionally consulted professionally by that company, drew contracts for it, &c.

It was considered by said committee, and Dewitt, representing Packer, assented, that Z. F. Walker would be a suitable person to run and establish the boundary line between the Schrader lands and the Packer lands, and he was accordingly selected for that purpose.

He was not informed of any concert of action between Dewitt, as the agent for Packer, on the one hand, and the Schrader Land Company on the other. He was employed by the executive committee of the Schrader Land Company, and he was paid by that company. His instructions were to establish and paint the boundary line of the Schrader lands. He had in his possession at this time a copy of the map of 1799, called the Broadhead map, a map made by Major Flowers of his re-survey of 1828, and the field-notes of Major Flowers made in 1828, before referred to; also in his possession or access to a copy of a map of the Vaughan or Priestly lands, including the George Moore, and showing the warrant number of the Moore according to the map attached to the deed of 1805.

In making his surveys in 1860 of the Schrader lands Walker had delineated the George Moore interference on a map made by him and given to the Schrader Land Company, showing the interference as claimed by the plaintiff, except as to the western boundary line, which was laid down on the

map as corresponding to the line of 1798, mentioned heretofore in these exceptions. No maps or documents were furnished Walker by either the Schrader Land Company or Jacob Dewitt to aid him in establishing the boundary.

After the line was painted, Dewitt and the executive committee went by rail some sixteen miles from Towanda to the foot of the plane, the railway station nearest the Schrader lands, and from thence Dewitt and two or three of the committee went up the Schrader creek to examine the painted line. They met Walker at the foot of the plane, who informed them that he had found some marks of an interference of survey on the Tybout tract, but that he had put the line where he believed it ought to be, and where it always had been. Dewitt and the members of the committe then went on the painted line, which was on the north, east, and south boundaries of the Andrew Tybout tract, and examined some portion thereof. Here Dewitt stated to the members of the committee who were with him that he was satisfied the interest he represented would be protected by the painted line; that he would thereby come into possession of the strip some thirty rods wide, running some two or three miles adjoining the Schrader lands (referring thereby, as the defendant claimed, to the lands between the 1798 line, before mentioned herein, and the Broadhead line). He also stated to the committee that they might go on and build their mill and cut up to the painted line.

This happened about the first of August, 1866. In the following fall two members of the said executive committee went to New York to see Mr. Packer and assure themselves of Mr. Dewitt's authority for establishing the painted line. They did see Mr. Packer, and informed him of what had been done in reference to running the line and fixing the line between the Packer lands and the Schrader lands; that Mr.

Dewitt, in association with a committee of the Schrader Land Company, had caused to be run and painted a line the whole length between the two parties, Mr. Dewitt acting for Mr. Packer. To this Mr. Packer replied [that] he had never been on the lands; that Mr. Dewitt was his attorney, and that what Mr. Dewitt did he consented to.

Subsequently, about 1869, Dewitt stated to one of the directors of the Schrader Mining and Manufacturing Company that he had been informed that company had trespassed upon Packer's lands. Dewitt and the said director went upon the lands and followed the painted line, and finding no cutting had been done beyond it, expressed himself as satisfied.

The plaintiff's evidence also showed that all of the said alleged trespasses were committed within certain boundaries marked upon the ground by a line of trees blazed and having the blazed marks painted white, which line was known as the painted line, and was claimed up to by the Schrader Land Company, the Towanda Tanning Company, under its purchase of the bark, and by the defendant company. Record, p. 26.

The line of 1798 referred to is thus described. Record pp. 28, 29:

As a part of his claim of title the plaintiff put in evidence a deed tripartite dated October 25, 1805, between Joseph Priestly and wife of the first part, John Vaughan, of the second part and Thomas Fitzsimmons, John Miller, Jr., and Robert Bird, trustees for certain creditors of John Vaughan, of the third part, which recited that—

"For as much as diveis inaccuracies have been discovered in the original surveys made of several of the tracts which in the division aforesaid fell to the lot of them, the said Thomas Fitzsimmons, John Miller, Jr., and Robert Bird, trustees aforesaid, the same have therefore since been surveyed and are

now more accurately designated in the annexed draft thereof, representing each tract as it is actually surveyed and marked upon the ground (mentioning subsequently, *inter alia*, the George Moore warrant, and giving also its fancy name of Greenfield); all which tracts are distinguished and marked on the annexed plan by numbers corresponding with those above enumerated, and are represented and described by the annexed plan of their survey thereof as actually re-surveyed and marked on the ground as aforesaid," and to which was attached a certain map referred to therein, which map was also given in evidence by the plaintiff.

A full copy of the said tripartite deed is hereto annexed and marked Exhibit K.

The width of the George Moore warrant, as shown by this map was 200 rods, which corresponds with the distance laid down in the return of survey, but the calls in the return for General Broadhead's lands gives the Moore survey an additional width of about thirty rods.

The said map showed the George Moore lot in the same position as in the survey thereof with regard to the surrounding lots of Henry Betz, Joseph Betz, and Samuel Cooley.

It was also shown by the plaintiffs' surveys, or one of them, that beginning on the north line of the Moore survey, as located on the ground by its return, at a point two hundred rods westerly from the hemlock, northeast corner, a line extended from a corner marked in 1798 nearly parallel with the east line of the Moore tract, and also nearly parallel with such east line projected southerly, which was run in 1798, for about three miles and sixty-four rods, where it ended, and an offset was thence made to the west to an undisputed line of 1792, bounding the Broadhead or Barclay lands on the east, the plaintiff's surveyor testifying that the said line of 1798 was evidently a trial line. Said Broadhead line ran

about thirty rods distant from and nearly parallel with said line of 1798 and extended from the hemlock sapling corner before mentioned, a distance of five or six miles southerly.

Plaintiff's evidence also showed a general survey of 1798 to have been marked on a number of the tracts mentioned in said deed of 1805.

The map attached to said deed in laying down the George Moore survey thereon and other surveys south of the same, laid them down as 200 perches in width, being the width called in the official surveys, and being about thirty perches less in width than the actual distance to the old line of the Broadhead lands called for in said surveys, and it was claimed by the defendant that the map thus showed the George Moore warrant was bounded on said map by the line of 1798 aforesaid. No other general survey of the lands mentioned in said deed of 1805 was made between the dates of the warrants and the date of the deed of 1805.

(The Broadhead line was the painted boundary line.)

The questions raised by these assignments of errors are these:

1. Since it appears that Dewitt knew there was an interference on the Tybout tract, and of the question as to the strip between the line of 1798 and the Broadhead line, and that by the painted line, the strip was given to Packer and the interference to the Schrader Company, and that he consented to the establishment of such line as the authorized agent of Packer, does not such consent bind the title?

2. If it does not bind the title, does it not, in connection with the acquiesence in the acts done upon the land by the Schrader Company, operate on the possession so as to oust Packer and bar trespass?

3. Does it not amount to a license?

4. Or, in view of all the facts does it not amount to an estoppel?

5. Is it presumed, as a matter of law, in the absence of affirmative evidence, that a party is ignorant of the true boundaries of his own land?

6. Was there not sufficient evidence upon this question to submit to the jury?

7. Is it not presumed that a party does know his own boundaries.

8. When one who is about to cut timber applies to his neighbor, for the expressed purpose of avoiding a trespass, to join in running a division line, which is accordingly done, is not such party protected from an action of trespass even though there be a mutual mistake as to the line run?

9. And is not this especially true where leave is expressly given to cut to such division line?

The owner of warrant 4881 sold it, but by mistake pointed out to his vendee 4880, an adjoining warrant on the north, as being the land sold, the vendor afterwards, as agent, bought for another person 4884, which adjoined on the south, the vendee of 4884 sold it out in lots, and by the same mistake pointed them out as being 4881; improvements were afterwards made on some of these lots, *held* that the original vendor of 4881 and his vendee were estopped from claiming the true 4881, both as to the parts improved and those unimproved.

Milligar vs. Sorg, 5 *P. F. Smith*, 215.
Id., 11 *Smith*, 471.

But the defendant gave evidence of the establishment of a consentable line, as a permanent boundary, which he contended was fixed by him and *Jackson*, under whom the plaintiff claims. This boundary leaves the land to the de-

fendant. Whether the parties ever agreed to it, and if they did, under what circumstances, were matters proper for the decision of the jury; what we have to do with is the direction of the Court in matters of law. It was laid down in general terms, that if, at the time of an agreement to establish a consentable line, as we technically call it, the parties labor under a mistake as to their respective rights, they will not be bound. To this doctrine I do not assent; no boundary of the sort could in any case prevail, if it were law, for the consideration of the agreement, is, ninety-nine cases out of a hundred, the settlement of a dispute arising from ignorance and misapprehension of right on both sides.

Perkins vs. Gay, 7 S. & R. 331.

It is no question, it cannot be made a question, but that consentable lines, settlement of boundaries, and holding by them, would, unless there was some fraud practiced, and an advantage taken of the ignorance of one party, the other being conversant of the real lines, be conclusive between persons competent to bind the rights. So I would hold, that a fair settlement, so made, by guardian, and acquiesced in by the infant holding possession after he came of age, would amount to a confirmation.

These settlements of boundaries are common, beneficial, approved and encouraged by the courts, and ought not to be disturbed, though it was afterwards shown that they had been erroneously settled, if they have been acquiesced in for a number of years.

Brown vs. Caldwell, 10 S. & R., 115.

Where one encourages another to enter upon land and invest money or expend labor, assuring him he will thereby acquire title, he cannot call in question such title even though he acted in ignorance of his own right.

Woodward vs. Tudor, 32 Smith, 382.

When by consent of the owners a line is run, such consent is a mutual license to both parties to treat the line as the true boundary.

Palmer vs. Anderson, 63 N. C., 365.

Where an act is done with the express or implied sanction of the owner of real estate, it shall not be treated as a tort, nor made the foundation of recovery in damages.

Den. Richman vs. Baldwin, 1 Zab., 404.

It does not follow that because a license is void for the purpose of carrying title, it may not enure as a personal authority, and until revoked protect the defendant from an action for a wrong.

Miller vs. Auburn R. R. Co., 6 Hill, 64.

Good faith requires that the owner of lands should not treat acts done under his authority, or with his express or implied sanction, as wrongful, or make them a foundation of recovery in damages, * * * and no citation of authority is necessary to show that a man cannot authorize another to enter upon or walk over his land and then sue him in trespass for taking advantage of his permission.

2 Am. Lead. Cases, 564.

Without attempting to collect the authorities or elaborate the argument, so much is submitted upon the merits to satisfy the Court that the writ is not intended for delay.

When a bond is held to be sufficient and the motion to dismiss is overruled, the motion to affirm will not be entertained.

Gay vs. Parpart, 11 Otto, 391.

Respectfully submitted,

JOHN F. SANDERSON,

Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888, No. 118.

Schraeder Mining and Manufacturing Co.

Plaintiff in Error, Defendant Below.

vs.

ELISHA A. PACKER,

Defendant in Error, Plaintiff Below.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

D. C. DeWITT,
Attorney for Defendant in Error.

Towanda Daily Review Print.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1888, No. 118.

SHRAEDER MINING AND MANUFACTURING COMPANY

vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

COUNTER STATEMENT BY DEFENDANT IN ERROR.

The defendant below has always claimed that the Moore tract was a "Chamber Survey"—that is, it was not made on the ground. This was the position taken by it in the last trial as we understand. When the case was first tried in the Common Pleas of Bradford County, the return of survey of the Moore called for the Betz tracts on the east. They were not surveyed till some months after the Moore. The Court said to the jury in substance that this call showed the Moore was

not surveyed on the ground at the time alleged in the return, because there were no Betz tracts there then and hence no such call existed. The jury upon this found the Moore survey a "Chamber Survey" and found against the plaintiff on the title. In presenting the case to the Supreme Court, in the oral argument, it was urged that the time had come when there should be an absolute presumption in favor of a survey after twenty-one years, and especially in this case where the timber had been cut and taken away by the defendant, so the lines could not be followed. So far as we know, no surveyor was ever on the ground at the hemlock sapling on the west line of the Moore for the purpose of following or trying to find the line north. Flowers and Walker were at this point and made some examination, but they were there surveying the Broadhead lands which cornered at this place. When they found the corner, which both did, they were satisfied and had no reason to look for or examine a line north. No surveyor was at this point for the purpose of locating the Moore until after the defendant had cut the timber. After this case was commenced, the defendant sent two surveyors, M. D. Trescott and Philo Alden upon the land to make an examination for it. They went to the hemlock sapling corner, and had no trouble in finding it. They examined for line north and found a new line marked on trees that had grown up since the timber had been cut. They examined the trees within a rod of either side of the line and found no old marks. From the hemlock sapling corner to the northwest corner of the Moore the distance is 222 rods. They only found from 12 to 15 trees in the whole dis-

tance old enough to bear the marks of the original line. They found the hemlock at the northeast corner of the Moore, and counted it and found it marked on four sides, corresponding with the date of the Moore survey. They also found the east line of the Moore marked plain. Where the timber had not been cut the lines were found. The undisputed evidence showed the hemlock called for at the northeast corner of the Moore, which is the same tree called for by Betz and Tybout, marked for a corner dating 1792. The Moore is the only tract of that date that corners at this point. This was a part of the evidence of the defendant. On the north line of the Moore old marks were found that could not be counted. The Court swept away all this evidence because the Moore called for the Betz on the east, when the Court said it was not there. The evidence did not show when the Betz and Moore were returned. When the case went to the Supreme Courl, the evidence was all printed. When the case was removed to the U. S. Circuit Court, this evidence which includes all the evidence given by both parties in this case up to the present time so far as work on the ground is concerned, was copied in full and sent with the record, and now constitutes a part of it. When the counsel for the present plaintiff in error added to his brief, a part of the case presented to the Supreme Court of Pennsylvania, it seems strange that he should have omitted that part of that case, which is also a part of the record in this case which would show just what is now complained of. Without this part of the record it is impossible for this Court to get a full understanding of this case. Upon

the trial of this case the plaintiff and defendant agreed with one George A. Burbank to take the evidence in the case, he being a stenographer. He took the evidence in full and it should be here in disposing of it. In his charge Mr. Justice Bradley says there is no evidence of a consentable line upon which to submit the question to the jury. The counsel for the plaintiff claims there was such evidence. How can this Court tell without the evidence that was produced on the trial being before it, whether the question should or should not have been submitted. In trying this case the Court followed the instructions given by the Supreme Court of Pennsylvania in this very case. In refusing to allow the defendant below to introduce evidence to show that the Moore was not surveyed on the ground, and was not adopted by the return of the Moore, Mr. Justice Bradley said: "In disposing of this offer, we shall follow what the Supreme Court of this State has said in this very case for two reasons. (1) it is the law of this state by which we are bound, and (2) it is entirely in accord with what our view of the law should be."

If the evidence had been brought up with the record, as it should have been, it would show that the defendant below was allowed to, and did, give evidence of all its surveyors did and found on the ground both on the Moore and Tybout warrants, and all tracts and lines for miles around them. It gave in evidence official maps, private maps, maps made by its counsel in the case, and maps made by deceased surveyors. The return (official) of the Moore called for a hemlock at its northeast corner; vacant land on the north with the Schrader Creek pass-

ing through its north line; a post at its northwest corner; vacant and lands of Gen. Broadhead on the west, with the Schrader Creek passing through the west line; the Samuel Cooly on the south; and the Joseph Betz and Henry Betz on the east. The surveyors all agreed upon the location of the Joseph Betz and Henry Betz upon the east, the Samuel Cooly on the south and the Robert Erwin being one of Gen. Broadhead's tracts upon the west. They also agreed that the Schrader Creek was properly laid in the west line of the Moore. They all agreed that the hemlock at the northeast was the tree called for in the return of the Moore, and that the marks in it on four sides counted the date of the Moore survey. All this was undisputed, and then to contradict the return of survey and show "that it was adopted merely by the return of the Moore," the defendant made its offer. The return called for a hemlock at the northwest corner of Henry Betz. The defendant proposed to start at a sugar in the west line of Joseph Betz. The north line in the return crosses the Schrader Creek. The defendant proposed to locate the line without going any where near the creek. The return called for a post something like 100 rods north of the Schrader Creek, and 222 rods north of the northwest corner of the Robert Irwin, which is a hemlock sapling. The defendant proposed to make the hemlock sapling the northwest corner of the Moore. This was an offer to show the Moore a member of a block where there was not one of the requisites to show a block in evidence, or offered to be put in evidence, and to ignore every mark, call, course and distance. The Court doubtless thought if the defendant had a surveyor

who was weak or wicked enough to attempt such a ridiculous task, it was its duty to protect him and not allow it to violate the old maxim, "lead me not into temptation."

ARGUMENT.

1. The first assignment of error is: "The learned Court erred in refusing to remand this cause to the State Court from whence it originated." The reasons assigned are two: see record, original page 39, printed page 16. The first reason "that the application for removal was not made in time," has been decided in Hess vs. Reynolds, 113 U. S. Rep., at page 73. Mr. Justice Miller says: "An application for removal under that clause is in time if made before the trial or final hearing of the cause in the State Court." The second reason is sustained by no evidence. The petition for removal is conclusive against it. (See printed page 8.)

2. The second error assigned is not based upon any exception. (See error, printed page 52.) It is as follows: "The learned Court erred in refusing to allow the defendant below to plead the statute of limitation." All the record shows may be found on pages 3 and 17 of the printed record. The rule was discharged, but whether by consent or otherwise, the record does not show."

Location.

3. The third assignment of error is as follows: "The learned Court erred in excluding the following offer of evidence made by the defendant below on the trial of the cause. The offer was as follows: In connection with this evidence the defendant offered to give further evidence founded on the examination, made upon the ground by surveyors in connection with the maps and other documents already in evidence, to show that the Moore warrant was not actually surveyed on the ground according to its return of survey, but that it was surveyed together with the Cooly and other warrants to the south of it, in one block of which the Moore was the northern member; that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corners corresponding to what was claimed by the defendant to be the south line of the Andrew Tybout tract; that no line of 1792 was surveyed on the ground for the Moore warrant north from the hemlock sapling corner, nor west from the hemlock northeast corner of the Tybout tract; that the line south from the hemlock northeast corner aforesaid, was run for warrants to the east of said line and was adopted merely by the return of the Moore." This assignment of error should be dismissed for the reasons following:

1. Geo. A. Burbank, a stenographer employed by the plaintiff and defendant, who was duly sworn as required by the statute of Pennsylvania, took a full report of the trial including the evidence, all offers, ruling of the Court, and objections. Without a copy of his record it is simply impossible to understand how the case was tried.

2. The transcript of record, see pages 28 and 53, shows a deed of 1805, with map or draft annexed were put in evidence. The deed is marked exhibit K, and copied in full, see pages 44, 5, 6 and 7. The map or draft, referred to in said deed, and which was put in evidence is not found in the record. Without it the deed is not evidence. In disposing of this question the map is of more importance than the deed. In disposing of the first assignment of error in Clement vs. Packer, 125 U. S. 309. Mr. Justice Lamar says: "The plaintiff in error, however, has not embodied copies of these patents in the record returned. The Court is therefore left uninformed as to the contents of the patents, or as to their materiality. What effect might have been given to this assignment of error, had evidence of the contents of the patents mentioned been sent up with the record, we need not consider in disposing of this case. It is sufficient to say this assignment of error is fatally defective for the reason given above, and it cannot be sustained."

In short, this offer was to show that the Moore warrant was not surveyed on the ground according to its return of survey; that the line east of the Moore and south from the hemlock corner was run for tracts east of said line; that the line west of the Moore and south from the hemlock sapling corner was run for tracts west of said line, and were adopted merely by the return of the Moore. The record shows this and nothing more. The offer does say something about showing the Moore the northern member of a block, but the evidence does not sustain the offer. In order to make a block of surveys in Clement vs. Packer, 125 U. S. 309. Mr. Jus-

tice Lamar says: "It should be bourne in mind that the William Elliott is not a single separate tract, surveyed at the same time, by the same surveyor, under warrants of the same date, and for the same owner, and returned into the land office as one body."

In Hagerty vs. Mathers et al. 31 Pa. St. 355, Woodward, J., says: "In other words, where surveys were made and returned into the land office in blocks, they are to be located on the ground in blocks. If then any of them are found to interfere with tracts belonging to the older blocks the younger gives away to the older." In Pruner vs. Brisbin, 98 Pa. St. 210, Sterrott, J., says: "The thirteen tracts having been surveyed in a block, and so returned must be located upon the ground as a block." There was no evidence in the case, nor in the offer of evidence to show that the Moore was surveyed in a block. Its return shows that it was not. Its warrant shows it was not, and there was no offer of competent evidence to show that it was.

In the "Brief of plaintiffs in error" at the bottom of page 37 may be found this: "The inference is that the surveyor mistook the distance between the tier of warrants in the name of Betz and Fritz (Exhibit F. O.) and the Broadhead line, and did his work on the ground so as to lay the Moore and others lengthwise from east to west, but finding his lines too short by one hundred rods, laid them the other way, (Exhibit O.)" This is a clear concession that the line from the sugar to the hemlock sapling which is the south line of the Tybout, was not run for the Moore. A surveyor may run and mark

as many trial lines as he please, and they amount to nothing until he adopts them and makes his return. Until he makes the return which makes the record, he may add a line, erase a line, change a line, enlarge the quantity, lessen the quantity, or make a resurvey if he is locating an indescriptive warrant such as Moore. This has been decided in many cases in Pennsylvania, among which are 4 W. & S. 348. 4 Wrt 267, and any number of cases therein cited. The offer was not to show that the surveyor ran the line from the sugar to the hemlock sapling corner for the north line of the Moore, and so returned it; but it was to show that he so ran it, and then abandoned it before he made his return. If he did this, he had a perfect right to, and the line thus abandoned, would not be a line of the Moore in any sense. Then the evidence was properly excluded.

Was there a presumption *juris et de jure* that the Moore warrant was actually surveyed on the ground? The surveyors who located the old warrants in Pennsylvania are all dead, their field notes and maps are mostly destroyed or lost. The men and boys who used the ax and carried the chain are also gone. Trees are destroyed by man and the elements and they also die. Very few of the old marked trees remain. Streams also change their course and dry up. Posts rot and even the stones get scattered and changed. The old land marks are gone or fast going. As titles grow old the presumptions in their favor grow stronger. Missing links are now presumed to have existed in paper titles. The law is progressive and must be so. The Supreme Court in this case did take an additional step. It ought to have been

taken earlier. The counsel for plaintiff in error state the law as it was in Pennsylvania, but since this case was before the Supreme Court, the law is just as Mr. Justice Bradley held it fo be in the trial of this case. The opinion of the Supreme Court is as follows:

I. Out page 379 opinion by Mr. Justice Gordon:

The question involved in this case is a very simple one—one of location only. The Moore survey was older than the Tybout. It was regularly returned and accepted, and was also patented. If, therefore, there were any marks found on the ground, or any adjoinders called for by the survey, as returned to the land office, by which the position of the tract could be ascertained, this controversy ought to have been determined by the jury in favor of the owners of this survey.

We repeat, the question was one simply of the location of the Moore warrant. Was there a corner or line found on the ground which was a corner or line found of this tract? If so, the question was resolved; for from either the location of the warrant could be readily determined by simply following the courses and distances called for by the survey. So, if there were known adjoinders, the location could, in like manner, easily be established.

But the court below, departing from this simple proposition, erred in two principal points: 1. In submitting to the jury the question whether or not the Moore survey was a chamber survey; 2. In saying to the jury that it was not enough that the surveyor was on the ground to survey the Moore warrant.—This, of course, meant that he could not adopt the lines of older or contemporaneous surveys as the lines of the Moore tract. But in

Parshall v. Jones, 5 P. F. Smith 153, it was said, following McRhea v. Plummer, 1 Binn. 227, and Caul v. Spring, 2 Watts 390, that the lines of older surveys may be adopted for a later warrant, without re-running or re-marking them, and that such a survey is not a chamber survey. To us, indeed, it seems strange that a proposition so obvious and reasonable should ever have been doubted; for as it is admittedly improper to remark old lines when adopted for a new survey, why should they be re-run? Certainly, for the purposes of location, this would be an unnecessary labor, and to us no reason occurs for the enforcement of such a work, except to compel the deputy surveyor to earn his fees.

A chamber survey is one that has never been made upon the ground, but where a survey has been returned and accepted without a caveat, the presumption, after twenty-one years, as was held in Ormsby v. Ihmsen, 10 Casey 462, is *juris et de jure* that it was made on the ground. In other words, this presumption is one that no fact, however obvious, can rebut. In the case just cited the court below, whilst holding that, after the period mentioned, the survey, returned by the proper officer, was by law presumed to have been run upon the ground, nevertheless instructed the jury that this presumption might be rebutted by positive proof. This was held to be error; that such was not the nature of the presumption attending a survey returned without objection for more than twenty-one years; that the presumption was absolute in its character—a legal conclusion. A like result was arrived at in the cases of Lambourn v. Hartswick and Mock v. Astley, 13 S. & R. 113; 382. Justice

Duncan, who delivered the opinions in both these cases, in substance said that, prima facie, a survey was made as returned, and that it was the business of the adverse party to disprove it; but that, where time, analogous to the Statute of Limitations, had run, where the owner had continued to pay the public taxes, and where there had been no caveat, a presumption of law ought to arise in favor of the regularity of the survey.

Following these cases, Huston, J., in Norris v. Hamilton, 7 Watts 91, held "that after a survey had been returned more than twenty-one years, the presumption that it had been legally made became a violent presumption, or as is said in the last case, not to be contradicted." The same idea is repeated in Bellas v. Cleaver, 4 Wright 267, per Thompson, J.

How, then, in view of these authorities, does the case in hand stand? The Moore warrant purported to have been surveyed on the 21st of November 1792, and was duly returned, accepted and patented; this final act of the land office occurring on the 24th of February 1795. Then, for twenty-one years after the date of this survey, the prima facie presumption was in favor of its correctness. Nevertheless, within that time, this presumption was prima facie only, and might have been rebutted by those interested in the interfering Tybout survey, by a caveat or in an action of ejectment. Neglecting this, allowing the survey to remain unquestioned for the period above mentioned, the presumption became absolute and was no longer open to attack.

The regularity of the survey being thus legally fixed and absolute, it but remains for a jury to determine

whether, upon the ground, such lines, adjoinders or other marks can be found as will, to a reasonable certainty, determine the location of the plaintiff's claim.

Finally, as the Moore and Betz warrants were located by the same surveyor, and as the former was not returned until after the survey of the latter, the adoption of the junior warrants, as adjoinders of the senior survey, ought to have no other effect than to help in the location of the older warrant.

The judgment of the court below is reversed, and a new *venire* is ordered.

As we understand the opinions of Mr. Justice Lamar in Clement vs. Packer and Mr. Justice Gordon in Packer vs. Shrader M. and M. Co., they are in harmony and both exclude this offer of evidence.

The fourth, fifth, sixth and seventh assignment of error must fall if the third is not sustained. They raise no new or different question. It is not necessary to examine them separately. They were properly disposed of following the law as laid down in this case by the Supreme Court in the opinion which is set forth in full in this brief.

THE QUESTION OF POSSESSION.

The specifications of error from eight to fifteen inclusive may be considered together as they raise but one question.

They should be dismissed for not being assigned according to rule 21, sections 2 and 4. They may be found in the transcript, pages 57, 58 and 59.

The evidence upon this part of the case may be found on p.p. transcript 31, 32 and 38.

On p.p. transcript 32 it is stated: "He," (meaning Walker who surveyed for the defendant below,) "had in his possession at this time a copy of the map of 1799 called the Broadhead map, a map by Major Flowers of his resurvey of 1828 and the field notes of Maj. Flowers made in 1828 before referred to, and also in his possession or access to a copy of a map of the Vaughn or Priestly lands, including the George Moore," etc.

The map made by Maj. Flowers, the field notes of Maj. Flowers, and the map of the Vaughn or Priestly lands are not found in the records. The same page of the transcript, to-wit, 32, shows that Walker made a map which he gave to the defendant below of his work. This map is not found in the record. To examine this question without these maps and field notes is to walk in the dark. Under the law as laid down by Mr. Justice Lamar in Clement vs. Packard, *supra*, these assignments of error should not be considered.

All the questions asked in plaintiff's brief are fully answered by Mr. Justice Bradley in his clear and able charge to the jury. He begins at the bottom of transcript p.p. 35 and ends near the top of page 39. We appropriate this part of the charge of the court for our complete answer to all the questions asked.

The evidence relied upon to sustain this part of the defence begins at the bottom of the 31 p.p. of the transcript. An examination of these pages will show: That Jacob DeWitt was the attorney of the plaintiff; that he was also attorney for the defendant company, and a

stockholder and director in it; that the plaintiff had never seen the lands he owned, and the evidence does not show that DeWitt ever had till after the lands were surveyed by Walker; that the first knowledge any of the parties had that there was an interference was when Walker told some of the company in the presence of DeWitt; that when Walker told them, he added he had put the line where he thought it ought to be, and where it always had been; that then DeWitt and some of the members of the company went with him upon the land, and DeWitt expressed himself satisfied; that Walker was employed by the company, paid by the company, and surveyed the lands of the company; that he was not informed of any concert of action between DeWitt as the agent of Packer and the company.

It is not claimed that the company yielded anything or assented to any thing in the settlement of this line by which as they claim DeWitt actually gave them 320 acres of valuable timber land. There is something about Packer getting the 30 rod strip between the Broadhead line and the line of 1798, but this is sheer nonsense, as there never was a doubt or a question but that he owned it. The defendant never claimed it. The evidence shows the 1798 line was an unofficial trial line. Packer did not get a foot of land that the company ever claimed by assenting to the painted line. There had been no dispute, no controversy, no question about the line of the plaintiff and defendant. There was nothing to settle. In refusing to allow this evidence to go to the jury the Court followed the law of Pennsylvania.

The authorities cited by plaintiff in error in its brief when carefully read sustain the Court.

Perkins vs. Gay 3 S. & R. 331, cited by plaintiff is a leading case. By reading that portion of the opinion not quoted by plaintiff, it will be found the Court is sustained. Kramer vs. Goodlander, 98 Pa. St. 354, sustains the Court. In fact the authorities are all in accord on this question in Pennsylvania, so we need not cite them. An examination of those cited by plaintiff will suffice.

TERMINATION OF PLAINTIFF'S TITLE.

The Court said, see transcript page 41, bottom, "If entitled to recover at all, the plaintiff was entitled to recover damages for all cutting and carrying away of timber from the disputed premises up to the time that he actually sold &c."

The question upon which the plaintiff in error has cited law is not raised in this case.

D. C. DE WITT,
Attorney for Defendant in Error.

30

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.8

No. 922. 573 ~~275~~ 26

THE OREGON RAILWAY AND NAVIGATION COMPANY,
PLAINTIFF IN ERROR,

vs.

THE OREGONIAN RAILWAY COMPANY, LIMITED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED AUGUST 31, 1885.

accession 23879

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 922.

THE OREGON RAILWAY AND NAVIGATION COMPANY, PLAINTIFF IN ERROR,

vs.

THE OREGONIAN RAILWAY COMPANY, LIMITED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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a In the Circuit Court of the United States for the District of Oregon. June Term, 1884.

Be it remembered that on the 28th day of June, 188–, there was duly filed in the circuit court of the United States for the district of Oregon a complaint, in words and figures as follows, to wit:

1 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

The plaintiff, for cause of action against the defendant, complains and alleges:

1. That at all times hereinafter referred to the plaintiff was, and it continues to be, a corporation, duly created and existing as such under and by virtue of the laws of Great Britain, and having its registered office at Dundee, in Scotland, and owning a railroad in the State of Oregon, and having duly complied with the laws of said State for the regulation of foreign corporations doing business therein.

2. That at all the times herein mentioned the defendant was, and still is, a corporation, duly incorporated under the general incorporation laws of the State of Oregon, having its principal place of business at the city of Portland, in said State.

3. That on or about the first day of August, 1881, by indenture of lease of that date, the plaintiff being thereto duly authorized by law, demised unto the defendant a certain railway or railroad, the same being the railroad owned by the plaintiff in the State of Oregon as aforesaid, together with certain stations, depots, and other property connected therewith or belonging thereto, the property of the plaintiff, for a term of ninety-six years from the date thereof, and the defendant, being thereto duly authorized by law and the resolu-
2 tion of its board of directors in consideration thereof, did, by the terms of said indenture, covenant and agree, among other things, to pay to the plaintiff therefor the yearly rental of twenty-eight thousand pounds sterling, money of Great Britain, in equal half-yearly payments, on the fifteenth day of May and the eleventh day of November in each year in advance.

4. That upon the execution of said indenture the said defendant entered into the possession of said demised property, and has continued in the enjoyment of the same to the present time, but, though requested thereto by the plaintiff, the defendant has neglected and refused to pay to plaintiff the sum of fourteen thousand pounds sterling, the instalment of rent which as aforesaid became due under said indenture or lease on the fifteenth day of May, 1884, and the same and the whole thereof remain due and unpaid.

5. That the equivalent of said sum of fourteen thousand pounds

sterling, in lawful money of the United States, is the sum of sixty-nine thousand three hundred dollars.

Wherefore the plaintiff demands judgment against said defendant for the sum of sixty-nine thousand three hundred dollars, with legal interest thereon from the 16th day of May, A. D. 1884, and for its costs and disbursements in this action.

NORTHUP AND GILBERT,
Attorneys for the Plaintiff.

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, Hugh Roger, being first duly sworn, say I am the managing agent of the plaintiff above named within the State of Oregon, and that the foregoing complaint is true as I verily believe.

HUGH ROGERS.

Subscribed and sworn to before me this 28th day of June, 1884.
[SEAL.]
W. B. GILBERT,
Notary Public for Oregon.

Endorsed: Filed June 28th, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

2½ And afterwards, to wit, on the 28 day of June, '84, there was issued of said court a summons in said cause, in words and figures as follows, to wit:

Summons.

3 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

The President of the United States to The Oregon Railway and Navigation Company, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Portland, in said district, and answer the complaint filed against you in the above-entitled action within ten days from date of the service of this summons upon you, if served within the county of Multnomah, in said district, or if served within any other county of said district then within thirty days from the date of such service upon you; and if you fail so to appear and answer for want thereof, the plaintiff will take judgment against you for the sum of sixty-nine thousand three hundred dollars and interest thereon from May 16, 1884, and its costs and disbursements in this action.

3¼ And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Portland, in said district, this 28 day of June, 1884.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON, *Clerk*,
By G. G. GAMMANS, *Deputy*.

DISTRICT OF OREGON, *ss*:

In obedience to the command of the within writ, I have served the same on the within named, The Oregon Railway and Navigation Company, by exhibiting said writ to Theodore Wygant, secretary of said Oregon Railway and Navigation Company, and by delivering to said Theodore Wygant, secretary of said Oregon Railway and Navigation Company, personally, at Portland, in Multnomah county, in said district, on the 28th day of July, 1884, a true copy of said writ, duly certified to by me as U. S. marshal, together with a copy of the complaint in said action, duly certified to by the clerk of the within-entitled court.

EDWARD S. KEARNEY, *U. S. Marshall*.
By JOSEPH SLOAN, *Deputy*.

[Endorsed:] No. 1035. In the circuit court of the United States for the district of Oregon. Oregonian Railway Co., Limited, *vs.* Oregon Railway & Navigation Company. Summons. Returned and filed June 30, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

3½ And afterwards, to wit, on the 7th day of July, 1884, there was duly filed in said court a stipulation, in words and figures as follows, to wit:

4 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

It is hereby stipulated and agreed by and between the parties hereto that the defendant herein shall have until the 20th day of July, 1884, in which to appear and plead to the complaint herein filed.

W. B. GILBERT,
Of Attorneys for Plaintiff.
C. A. DOLPH,
Of Def't's Att'ys.

(Endorsed:) Filed July 7, 1884. R. H. Lamson, clerk.

4½ And afterwards, to wit, on the 19th day of July, 1884, there was duly filed in said court an answer, in words and figures as follows, to wit:

5 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

The defendant answers to the complaint that about the 1st day of August, 1881, the president and assistant secretary of the defendant signed, as for the defendant, an instrument in writing, and affixed thereto defendant's corporate seal, which instrument was in the terms such an indenture of lease as is described in the complaint, and is in fact the same instrument so described; but defendant denies that either plaintiff or defendant was at any time authorized by law to enter into said or any indenture of leasing, and defendant alleges that both the plaintiff and the defendant were without the power to enter into such contract; that the State of Oregon did not authorize or consent to such contract of leasing, or to any leasing by the plaintiff, or taking lease by the defendant, of the said railway, and the said pretended agreement was unauthorized and void.

That it is true that defendant entered into possession of the said railway, and so continued, under the said pretended lease, to the 15th day of May, 1884; but defendant denies that it had or was thereafter in possession of the said property, or is now in such possession, except as is herein now stated.

That on the said 15th day of May the defendant disavowed said pretended lease and disclaimed any obligation thereunder, and
6 offered to restore, and tendered to the plaintiff, the said railway property; that thereupon plaintiff requested defendant to continue in the possession of said road and operate the same to prevent losses which might otherwise result from suddenly discontinuing such operation, upon the understanding that the act of defendant in so doing should in nowise be construed as imposing any obligation upon defendant to pay rent therefor or as implying any obligation to pay such rent; that upon such request and understanding, and not otherwise, defendant continued to retain such possession for a period of six months from said date, provided it could do so without loss to itself; that in pursuance of said agreement and understanding so had, and in consideration of the same, defendant has continued in possession of said road, and has operated the same since the said 15th day of May.

That by the terms of the said pretended lease there was to be paid to the plaintiff, by the defendant, 28,000 pounds, in semi-annual payments of 14,000 pounds each, in advance, on the 15th days of November and May of each year.

That defendant fully paid the rental so provided for for the full period for which defendant held possession of said railway under said pretended lease, being for the period ending on the said 15th day of May, 1884, and it is not true that any sum of money became due on said date or is owing to plaintiff from defendant.

Wherefore defendant prays judgment for its costs and disbursements herein.

DOLPH,
BELLINGER,
MALLORY, AND
SIMON,
Defendant's Attorneys.

7 STATE OF OREGON, } ss:
County of Multnomah, }

I, Theodore Wygant, being first duly sworn, say that I am secretary of the Oregon Railway and Navigation Company, defendant above named, and that the foregoing answer is true, as I verily believe.

THEODORE WYGANT.

Subscribed and sworn to before me this 19th day of July, A. D. 1884.

J. SILVESTONE,
Notary Public for Oregon.

Copy served, July 19th, 1884.

W. B. GILBERT,
Of Pl'ffs' Att'ys.

(Endorsed:) Filed July 19, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

7½ And afterwards, to wit, on the 21st day of July, 1884, there was duly filed in said court a stipulation in words and figures as follows, to wit:

8 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

It is agreed and stipulated by and between the parties hereto that the plaintiff shall have ten days from this to plead to the answer of the defendant.

July 21st, 1884.

DOLPH,
BELLINGER,
MALLORY, AND
SIMON,
Attorneys for Defendant.

(Endorsed:) Filed July 21, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

8½ And afterwards, to wit, on Wednesday, the 30 day of July, 1884, the same being the 47th judicial day of the regular April term of said court—present: the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

9 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

JULY 30, 1884.

Now, at this day, comes the defendant in the above-entitled cause, by Mr. Cyrus A. Dolph, of counsel, and, upon motion of said defendant, it is ordered that it be, and it hereby is, allowed to file and amended answer herein, which is now done.

9½ And afterwards, to wit, on the 30th day of July, 1884, there was duly filed in said court an amended answer, in words and figures as follows, to wit:

10 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

The defendant, by this its amended answer, by leave of the court filed, answers to the complaint.

That it admits that the plaintiff, at the times in the complaint referred to, was, and continues to be, a corporation under the laws of Great Britain, having its registered office at Dundee, in Scotland; but defendant denies that plaintiff was, or is, authorized or empowered by its articles of incorporation or memorandum of association to construct or own the railroad in the complaint mentioned or any railroad in the State of Oregon.

That about the 1st day of August, 1881, the president and assistant secretary of the defendant signed an instrument in writing, and affixed thereto defendant's corporate seal, which instrument was in its terms such an indenture of lease as is described in the complaint, and is in fact the same instrument so described; but defendant denies that either plaintiff or defendant was at any time authorized by law to enter into said or any indenture of leasing, and defendant alleges that both the plaintiff and the defendant were without the power to enter into such contract; that the State of Oregon did not authorize or consent to such contract of leasing or to ony
11 leasing by the plaintiff, or taking in lease by the defendant, of the said railway, and the said pretended agreement was unauthorized and void.

That it is true that defendant entered into possession of the said railway and so continued under the said pretended lease to the 15th day of May, 1884; but defendant denies that it had or was thereafter in the possession of the said property or is not in such possession, except as is herein now stated.

That on the said 15th day of May the defendant disavowed said pretended lease, and disclaimed any obligation thereunder, and offered to restore and tendered to the plaintiff the said railway property; that thereupon plaintiff requested defendant to continue in the possession of said road and operate the same, to prevent losses which might otherwise result from suddenly discontinuing such operation, upon the understanding that the act of defendant in so doing should in no wise be construed as imposing any obligation upon defendant to pay therefor, or as implying any obligation to pay such rent; that upon such request and understanding, and not otherwise, defendant consented to retain such possession for a period of six months from said date, provided it could do so without loss to itself; that in pursuance of said agreement and understanding so had and in consideration of the same defendant has continued in possession of said road and has operated the same since said 15th day of May.

That by the terms of the said pretended lease there was to be paid to plaintiff by defendant 28,000 pounds, in semi-annual pay-
12 ments of 14,000 pounds each, in advance, on the 15th days of November and May of each year.

That defendant fully paid the rental so provided for for the full period during which defendant held possession of said railway under said pretended lease, being for the period ending on the said 15th day of May, 1884, and it is not true that any sum of money became due on said date or is owing to plaintiff from defendant.

Wherefore defendant prays judgment for its costs and disbursements herein.

DOLPH,
BELLINGER,
MALLORY, AND
SIMON,
Defendant's Attorneys.

STATE OF OREGON, *County of Multnomah:*

I, Theodore Wygant, being first duly sworn, say: I am secretary of the Oregon Railway and Navigation Company, defendant above named; that I have read the foregoing amended answer, and believe the same to be true.

THEODORE WYGANT.

Subscribed and sworn to before me, this 29 day of July, 1884.
[SEAL] W. T. HUME,
Notary Public in and for Oregon.

(Endorsed:) Filed July 30, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

12½ And afterwards, to wit, on the 31st day of July, 1884, there was duly filed in said court a stipulation in words and figures as follows, to wit:

13 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the plaintiff shall have ten days in which to reply or plead to the answer of the defendant filed herein.

Dated this 31st day of July, 1884.

W. B. GILBERT,
Of Attorneys for Plaintiff.

DOLPH,
BELLINGER,
MALLORY, AND
SIMON,
Attorneys for Defendant.

(Endorsed:) Filed July 31, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

13½ And afterwards, to wit, on the 11th day of August, 1884, there was duly filed in said court a motion in words and figures as follows, to wit:

14 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

Now this day comes the plaintiff, by its attorneys, and most respectfully moves the court to allow the plaintiff herein until Saturday, the 16th day of August, at 10 a. m., in which to file an amended complaint in this cause.

1st. Setting forth and showing more specifically the foreign law under which plaintiff claims to be an incorporated body and the rights, privileges, and franchises acquired by plaintiff thereunder.

2nd. By setting forth and showing the memorandum of association and the articles of association of plaintiff under said foreign law.

3rd. By setting forth and duly showing compliance with said foreign law as to registration.

4th. By setting forth and showing defendant's articles of incorpo-

ration, and their right to enter into the lease in the original complaint mentioned.

5th. By setting forth and pleading an offer of defendant to restore the possession of said demised property mentioned in the complaint, and of plaintiff's refusal to accept surrender of said lease and property, and by pleading that said property, as to value, good
15 condition, repair, and equipment, was not at the time of said offer to restore possession as when received by defendant as contemplated by said leasing.

6th. By setting forth and showing a certain agreement without prejudice to said leasing and plaintiff's rights thereunder, entered into between plaintiff and defendant, under which said defendant continued to use and operate said demised property, and by showing said agreement to be without prejudice to the rights of both parties to and under said leasing, said agreement being dated May 15th, 1884.

7th. Lastly, by setting forth and showing plaintiff's rights and powers to enter into the contract declared on both under the foreign law and the laws of this State and the United States.

J. W. WHALLEY,
Of Attorneys for Plaintiff.

(Endorsed:) Filed August 11, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

15½ And afterwards, to wit, on Monday, the 11th day of August, 1884, the same being the 52nd judicial day of the regular April term of said court—present: the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

16 THE OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

AUGUST 11, 1884.

Now at this day comes the plaintiff in the above-entitled cause by Mr. John W. Whalley, of counsel, and moves the court for leave to file and amended complaint, so as to set forth the matters contained in its written motion now filed herein, and thereupon it is ordered that said motion be, and the same is hereby, allowed.

16½ And afterwards, to wit, on the 15th day of August, 1884, there was duly filed in said court an amended complaint in words and figures as follows, to wit:

17 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

The plaintiff, by this its amended complaint, complaining of the

defendant for cause of action, alleges that at all the times hereinafter stated the plaintiff was and is a corporation duly created and existing as such under and by virtue of a certain act of Parliament of the United Kingdom of Great Britain and Ireland, entitled "An act for the incorporation, regulation, and winding up of trading companies and other associations." 25 & 26 Vict. C., 89, and dated & passed 7th August, 1862, and of the act amendatory thereof and supplementary thereto, and which act of Parliament is by said act authorized to be cited as "The Companies' Act of 1862."

That under and by section six of said "The Companies' Act of 1862" it is provided as follows: "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company with or without limited liability."

That by section eight of said "The Companies' Act of 1862" it is further provided that "Where a company is formed on the principal of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things (that is to say):

18 "(1.) The name of the proposed company, with the addition of the word 'limited' as the last word in such name.

"(2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate.

"(3.) The objects for which the proposed company is to be established.

"(4.) A declaration that the liability of the members is limited.

"(5.) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount.

"Subject to the following regulations:

"(1.) That no subscriber shall take less than one share.

"(2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes."

That under and by section nine of said "The Companies' Act of 1862" it is further provided that "Where a company is formed on the principal of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the want of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things (that is to say):

"(1.) The name of the proposed company, with the addition of the word 'limited' as the last word in such name.

"(2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate.

"(3.) The objects for which the proposed company is to be

19 established.

(4.) A declaration that each member undertakes to contribute

to the assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterward, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributors amongst themselves, such amount as may be required not exceeding a specified amount.

That by section eleventh of said "The Companies' Act of 1862" it is further provided that "the memorandum of association shall bear the same stamp ever a deed, and shall be signed by each subscriber in the presence of and be attested by one witness at the least, and that attestation shall be a sufficient attestation in Scotland as well as in England and Ireland. It shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this act.

That by section fourteen of said "The Companies' Act of 1862" it is further provided that "the memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient; the articles shall be expressed in separate paragraphs numbered arithmetically; they may adopt all or any of the provisions contained in the table marked (A) in the first schedule hereto; they shall in the case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered, and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fess payable in registration.

In a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes.

That by section sixteen of said "The Companies Act of 1862" it is further provided that "the articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of and be attested by one witness at the least, and such attestation shall be a sufficient attestation in Scotland as well as in England and Ireland; when registered they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles

contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations contained in such articles, subject to the provisions of this act, and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to
21 the company, and in England and Ireland to be in the nature of a specialty debt.

That by section seventeen of said "The Companies' Act of 1862" it is further provided that "the memorandum of association and the articles of association, if any, shall de delivered to the registrar of joint stock companies hereinafter mentioned, who shall retain and register the same. There shall be paid to the registrar by a company having a capital divided into shares, in respect of the several matters mentioned in the table marked 'B' in the first schedule hereto, the several fees therein specified, or such smaller fees as the board of trade may from time to time direct, and by a company not having a capital divided into shares, in respect of the several matters mentioned in the table marked (C) in the first schedule hereto, the several fees therein specified, or such smallar fees as the board of trade may from time to time direct; all fees paid to the said registrar in pursuance of this act shall be paid into the receipt of her majesty's exchequer, and be carried to the account of the consolidated fund of the United Kingdom of Great Britain and Ireland."

That by section eighteen of said "The Companies' Act of 1862" it is further provided that "upon the registration of the memorandum of association and of the articles of association, in cases where articles of association are required by this act, or by desire of the parties to be registered, the registrar shall certify, under his hand, that the company is incorporated, and in the case of a limited company that the company is limited; the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall there-
22 upon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned; a certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this act in respect of registration have been complied with."

And plaintiff alleges that on the 30th day of April, 1880, in pursuance of the provisions of law in the said "The Companies' Act of 1862," hereinbefore mentioned, and of the other provisions of said act, and of the acts supplementary thereto and amendatory thereof, a certain memorandum of association, entitled a memorandum of association of the Oregonian Railway Company, limited, was made

and entered and duly executed by the following-named persons, viz.:

Airlie, of Cortachy Castle, Kerriemuir, in the county of Forfar; William Lowson, of Dundee, in the county of Forfar, merchant; Thomas H. Cox, of Dundee, in the county of Forfar, merchant; John Leng, of Kimbræ Newport, in the county of Fife, newspaper proprietor; P. M. Cochrane, of Dundee, in the county of Forfar, merchant; Alex. Henderson, of Dundee, in the county of Forfar, merchant; Alex'r Nicoll, of Dundee, in the county of Forfar, merchant; James Stevensen, of Dundee, in the county of Forfar, dyer; John M. Watson, of Dundee, in the county of Forfar, stock-broker; William M. McKenzie, of Dundee, in the county of Forfar, stock-broker; which memorandum of association is in the words and figures to the effect following—that is to say:

23 *The Companies' Acts* 1862, 1867, *and* 1877. *Company Limited by Shares.*

Memorandum of Association of the Oregonian Railway Company, limited.

1. The name of the company is the Oregonian Railway Company, limited.

[2.] The registered office of the company will be situate in Scotland.

3. The objects for which the company is established are:

First. The building, constructing, reconstructing, equipping, owning, operating, leasing or selling, transferring or disposing of, or purchasing or otherwise acquiring, holding, and operating, or otherwise using, working, or dealing in all or any such railway or railways, railroad or railroads, in the State of Oregon and the Territory of Washington, in the United States of America, or in either of them, or between such points in said State or Territory or elsewhere in North America as may from time to time be resolved or determined upon by said company, and the carrying of passengers, goods, and minerals and all other traffic and freight on, and the doing and performing of all other acts, deeds, and other operations connected with railways and railroads in the said State and Territory, or either of them, or elsewhere in North America.

Second. The building, constructing, equipping, owning, and operating, or the leasing, selling, transferring, holding, or acquiring, by purchase or otherwise, and the working and using of one or more lines or portions of lines of railroad or railway, or parts thereof, from (first) the city of Portland or the city of Astoria, in the State of Oregon, United States of America, or from either or both of said cities, or from some other point or place on the Willamette
24 or Columbia rivers, in said State of Oregon, through any part or portion of the said State of Oregon lying west or south of the Cascade range of mountains, in said State, to some point at or near, in or upon said Cascade range of mountains; (second) from thence, or from any part or portion of the western or southwestern part of said State of Oregon, to and across and to the east side of said

Cascade range of mountains, through a pass in said mountains at or near that fork or branch of the Willamette river, in said State of Oregon, known as the middle fork or branch of said river, or through some other pass in said mountains, within one hundred miles north or south of said middle fork or branch of said river, where shall be found to be on actual survey the easiest and most practicable route across the Cascade range of mountains; (third,) thence through that portion of said State of Oregon lying east of said Cascade range of mountains and on through the Territories of Washington or Idaho, or the States of Nevada and California, in the United State of America' or through all or any one or more of said States and Territories to a connection with, or without making any connection with, any other railway or railways in either of said States of Oregon, California, or Nevada, or Territories of Washington or Idaho, and with or without one or more branch lines (*a*) running north, south, east, or west from said main line on the east side of said Cascade range of mountains, or (*b*) running from said main line on the west side of said Cascade range, in said State of Oregon, forming a junction, or one or more junctions, with said main line, at one or more points, to a terminus in said portion of the State of Oregon west of said Cascade range of mountains, or to a junction with said main line, or to a terminus or termini at one or more seaports on the shores of the Pacific Ocean, all as may from time to time be determined by actual surveys; as also to purchase, build, construct, own, equip, and operate, or to enter into agreements to run over or to lease (1) any line or lines, branch or branches, of railway or railways, railroad or railroads, that may connect with or become attached to, or meet or become a part of the said main line or its main branch or any of its branches hereinbefore designated; or (2) such other main or branch line or lines, or extensions of any railway or railways, railroad or railroads, made in connection with this company's main line, or of any of its branches, or separate and distinct therefrom, all in such manner of way or form and on such terms as said company shall from time to time deem advisable and for its interests, and the doing and performing of all other operations connected with said designated railway or railways, railroad or railroads, or branches thereof, or in connection with other railways of a similar or different nature, the doing and performing of which this said company shall at any time deem advisable and for its interests in the carrying out of its business.

Third. The building, constructing, purchasing, or otherwise acquiring, holding, equipping, owning, and operating, or the leasing and operating, or the leasing, equipping, and operating, or the selling, transferring, or otherwise disposing of, and the working and using of any other railway or railroad, or of any wharves, jetties, steamboat, or steamship, stage, or of any canals, locks, bridge, clay road, plank road, turnpike, hack, truck, or express lines, or any other line, lines, or means for the transportation of freight or passengers, or either or both, now constructed or operated in whole or in part, or which may be hereafter constructed or operated in whole or in part, in either of the

said States of Oregon, California, or Nevada, or said Territories of Washington or Idaho, and that whether in connection with or separate and distinct from, and as line or means independent of said railway or railways, railroad or railroads, so to be built, constructed, purchased, owned, equipped, or operated as aforesaid by this company.

Fourth. The entering into agreements for and the taking, holding, or the guaranteeing of bonds, shares, debentures, dividends, or mortgages and other indebtedness of any other railway or railroad company or companies, or of any canals, locks, bridges, clay road, plank road, turnpike, steamboat, steamship, stage, express or telegraph companies in the United States of America or Dominion of Canada.

Fifth. The entering into agreements with any person, persons, firm, copartnership, company, or corporation that may be the owners and operators or the operators of any railway, railroad, steamboat, steamship, express, hack, truck, or stage line or lines, canal, locks, bridge, clay road, plank road, turnpike, or any other means of transporting freight or passengers, or either or both, and who may be in any manner of form engaged in the business or occupation of common carriers, or the transportation of freight and passengers, or either or both, or for the joint use, occupation, and enjoyment of their several lines or the branches thereof, or of any or all other property, both real [and] personal, or both, owned or used by them, or either of them, respectively, or for the operating their respective lines on joint leases, or in any manner and form for the mutual or joint, or the mutual and joint, transportation of freight and passengers, or either or both, over their respective lines of transportation.

Sixth. The building, constructing, equipping, owning, operating, leasing, selling, transferring, or otherwise disposing of, purchasing, or otherwise acquiring, holding and operating, or otherwise using, working, or dealing in any telegraph or telephone line or lines, or any warehouse or warehouses, or building or buildings, for receiving or storing grain or other produce, in any manner connected with or unconnected with, or requisite, necessary, or convenient for the operation of the main or any branch line of railway, railroad, or for any other means, manner, or line of transportation constructed, built, leased, or in any manner operated by or in connection with this company, in any manner or form whatsoever.

Seventh. The acquiring, by purchase or otherwise, or by donation or gifts, of such real and personal property as this company may find requisite, necessary, or convenient for carrying into effect, fully and completely, the objects of the company and the transaction of its business, and to hold and dispose of the same at the pleasure of this company, and the acquiring, holding, leasing, transferring, and otherwise using and disposing of any real or personal property, of whatever nature, or of any rights and privileges acquired, or which may from time to time be acquired, by the company, or which may be given, granted, or conveyed to it for the purpose of aiding it in

the construction and operation of its aforesaid line or lines of railway, or branches thereof, or extension therefrom, or for any or different purpose whatsoever, as also the acquiring, under the laws of the States of Oregon, Nevada, or California, or the Territories of Washington and Idaho, or any other States or Territories in the United States under the laws of the United States, or under the laws of the Dominion or any province of Canada, or under the laws of any one or more or all of them, of such real or personal property, or the right to the use or occupation of the same, by appro-
28 priation or otherwise, in such manner as is now, or may hereafter and from time to time be, provided by the laws of either of the said States or Territories in the United States, or by the laws of the United States, or by the laws of the Dominion or of any province of Canada, or either one or more or all of them.

Eighth. The borrowing of money in the United States of America, or in the United Kingdom of Great Britain and Ireland, or in Europe or elsewhere, on, or on the security (first) of, bonds or promissory notes of debentures, or other deeds or obligations of the company; or, (second), of bonds or promissory notes or other deeds or obligations of the company containing also, or separately secured by, mortgage or trust deed, of all, or any portion of, the company's property and assets, real or personal, or on all, or any portion of, its property and assets, real or personal, and of, or on all, or any of, its franchises, powers, and privileges; or, (third), of bonds or mortgage debentures, as also the raising of and procuring money by the creation and issue of preference shares, or by the creation and issue of guaranteed shares, or by any other means, or by any other manner or form, which the company at any time deem advisable.

Ninth. The amalgamating, or otherwise uniting the company with any other railway, railroad, steamboat, steamship, canal, lock, bridge, stage, hack, truck, express, or telegraph, or telephone company, or in any other company or institution engaged in the business of transportation of freight or passengers, or both, whose objects shall be wholly or partially similar to those of the company, or absorbing any such other company or institution, or purchasing or acquiring its business on any terms and in any manner.

Tenth. The carrying on of the business of common carriers and the fixing and exaction of tolls and freights, and the transact-
29 ing and doing of all such other matters and things as the company shall from time to time consider conducive or incidental to the above objects, or any of them; but the company shall not do anything whereby the limitation of the liability of its members shall be prejudiced.

Lastly, the doing whatever else may be from time to time sanctioned by a special resolution of the company.

4. The liability of the members is limited.

5. The capital of the company is one hundred and sixty thousand pounds, divided into sixteen thousand shares of ten pounds each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the

number of shares in the capital of the company set opposite our respective names:

Airlie, of Cortachy Castle, Kerriemuir Co. of Forfar, 100 shares; Wm. Lowson, of Dundee, in the Co. of Forfar, merch't, 100 shares; Thos. N. Cox, of Dundee, in the Co. of Forfar, merch't, 100 shares; John Leng, of Kinbrae, Newport, in the Co. of Fife, newspaper proprietor, 100 shares; P. M. Cochrane, of Dundee, in the Co. of Forfar, merch't, 100 shares; Alex. Henderson, of Dundee, in the Co. of Forfar, merch't, 100 shares; Alex. Nicoll, of Dundee, in the Co. of Forfar, merch't, 100 shares; James Stevenson, of Dundee, in the Co. of Forfar, dyer, 100 shares; John M. Watson, of Dundee, in the Co. of Forfar, stock-broker, 100 shares; Wm. Mackenzie, of Dundee, in the Co. of Forfar, stock-broker, 50 shares. Total shares taken, 950.

Dated the thirtieth day of April, eighteen hundred and eighty *years.*

Witness the above signatures:

WM. ARTHUR BELL,
Apprentice to Messrs. Pattulls & Thomton,
Solicitors, 1 Bank St., Dundee.

30 That on the said 30th day of April, 1880, in pursuance of the provisions of law in the said "The Companies' Act of 1862," hereinbefore mentioned, and of the other provisions of the acts supplementary thereto and amendatory thereof, and contemporaneously with the execution of the memorandum of association aforesaid, the said Airlie, of Cortachy Castle, Kirriemuir, in the county of Forfar; William Lowson, of Dundee, in the county of Forfar, merchant; Thomas H. Cox, of Dundee, in the county of Forfar, merchant; John Leng, of Kimbrae, Newport, in the county of Fife, newspaper proprietor; P. M. Cochrane, of Dundee, in the county of Forfar, merchant; Alex. Henderson, of Dundee, in the county of Forfar, merchant; Alex. Nicoll, of Dundee, in the county of Forfar, merchant; James Stevenson, of Dundee, in the county of Forfar, dyer; John M. Watson, of Dundee, in the county of Forfar, stock-broker; William McKinzie, of Dundee, in the county of Forfar, stock-broker, did enter into and make and duly execute articles of association as required by said acts, and thereupon did, on the said 30th day of April, 1880, duly deliver them to the registrar of joint stock companies, as required by section seventeen of said "The Companies' Act of 1862," who thereupon did duly retain and register the said memorandum and articles of association, and did duly thereupon certify, under his hand, the said "The Oregonian Railway Company, limited," to be incorporated, and said company to be limited, which articles of association are in the words and figures and to the effect following—that is to say:

Articles of Association of The Oregonian Railway Company, Limited. Table A not to apply.

31 1. The regulations of table A, in the first schedule to The Companies' Act, 1862," shall not apply to this company, except so far as the same are repeated or contained in these articles.

Capital.

2. The original capital shall be 160,000 pounds, divided into 16,000 shares of 10 pounds each, which, so far as not subscribed for in the memorandum and articles of association, may be alloted and issued to such persons as the directors may consider proper.

Shareholders to be and continue associated.

3. The registered holders of shares in the company for the time being, whatever the number issued or subscribed, shall be and continue associated, and the business of the company may be at once commenced and the regulations for the management of the company shall be in force. Every person to whom any share or shares shall have been alloted in consequence of any application from him shall be deemed to be a member of the company along with all subscribing members, and shall be entered as a member upon the register of members.

Capital may be increased.

4. The company may, by the resolution of a general meeting, increase its capital beyond the amount mentioned in the memorandum of association by the creation of new shares of such amounts per share and in the aggregate and on such terms as such resolutions shall direct; and any new capital so created may cary such preferential right to dividend or such priority in the distribution of assets, or be subject to such postponement of dividends or in the distribution of assets as any resolution of a general meeting passed previously to its issue shall direct; but, save as aforesaid, all new capital shall be subject to the same provisions in all respects as if it had been part of the ordinary capital mentioned in the memorandum of association.

32 Shares may be consolidated or subdivided or capital reduced.

5. The shares, or any class of shares, may from time to time be consolidated into a smaller number of shares or divided into a larger number of shares, or the capital may be reduced by such resolutions and proceedings as the law requires.

Shares.

Receipts for dividends on shares held jointly.

6. If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share, or for any interest on prepaid calls.

Certificates of shares and renewal thereof.

7. Every member shall be entitled to a certificate under the common seal of the company, specifying the share or shares held by him, and the amount paid up, or deemed to be paid up, thereon; and if such certificate be worn out or lost it may be renewed on pay-

ment of five shillings, or such less sum as the directors may prescribe.

Registered shareholders only to be recognized.

8. The company shall not be bound by or recognize, even though having notice thereof, any other right in respect of a share than an absolute right thereto in the registered holder thereof for the time being, and such right in case of transmission as hereinafter mentioned.

Transfer of Shares.

Execution of transfers.

9. The instrument of transfer of any share in the company shall be executed both by the transferrer and transferree, and the transferrer shall be deemed to remain the holder of such share
33 until the name of the transferee is entered in the register book in respect thereof.

Execution of transfer of shares.

10. All transfers of shares of the company shall be valid and effectual if executed according to the usual mode of executing such instruments by the law of Scotland, or by the law of England, or partly according to the one and partly according to the other.

Directors may decline to register transfer of shares.

11. The directors may decline to register any transfer of shares made by a member who is indebted to the company or to any person not approved by them.

Registration of transfers.

12. Every deed of transfer must be left at the office of the company to be registered, accompanied with such evidence as the directors may reasonably require to prove the title of the transferrer, and with the payment of such fee as the directors shall from time to time determine, and thereupon the company, subject to the powers vested in the directors by the immediately preceding article, shall register the transferee as a shareholder, and retain the deed of transfer.

Directors not bound to see to validity of transfers.

13. In no case shall the directors be bound to enquire into the validity, authority, legal effect, or genuineness of any deed of transfer produced by a person claiming as transferee of any share in accordance with these articles, and whether they abstain from so enquiring, or do so enquire, and are misled, the transferrer shall have no claim whatsoever upon the company in respect of the share, except for the dividends previously declared in respect thereof, but only, if at all, upon the transferee.

34 Closing of transfer books.

14. The transfer books may be closed during the fourteen days

immediately preceding any general meeting or any issue of new shares.

Transmission of Shares.

Transmission from deceased members to executors, &c.

15. The executors or administrators of a deceased member shall be the only persons recognized by the company as having any title to his shares.

Transmission and registration in case of death, bankruptcy, &c.

16. Any person becoming entitled to a share in consequence of the death or bankruptcy of any member or in consequence of the marriage of any female member, may, upon such evidence being produced as may from time to time be required by the directors, either be registered himself as a member, or execute a transfer of the share to his nominee, subject to the approval of the said nominee by the directors.

Calls on Shares.

Calls.

17. The directors may from time to time make such calls upon the members, in respect of all moneys unpaid on their shares, as they may think fit, provided that four weeks' notice at least is given of each call.

Liability of members and interest on calls in arrears.

18. Each member shall be liable to pay the amount of calls so made to the persons, and at the times and places appointed by the directors, and in case of default to pay interest for the same at the rate of 10 per cent. per annum from the day appointed for payment thereof to the time of the actual payment, and joint holders of shares shall be liable severally, as well as jointly, in respect of all calls thereon.

Prepayment of calls to bear dividends or interest.

19. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys payable upon the shares held by him beyond the sums actually called up, and the moneys so paid in advance, or so much thereof as shall from time to time exceed the amount of the calls then made upon the shares in respect of which such advance shall have been made, may, as the directors and the members paying the same may agree, be treated either as payments in advance in respect of such shares, entitling the holders thereof for the time being to dividends at the same rates as if such moneys had been paid up in pursuance of calls, or as loans as such interest and on such terms as the members paying such sums in advance and the directors shall agree upon.

Lien on Shares.

Company's lien on shares.

20. The company shall have a first charge or paramount lien on all shares for all moneys due to it from the holder or any of the joint holders thereof, either alone or jointly with any other person, including all calls, the resolutions for which shall have been passed by the directors, although the times appointed for their payment may not have arrived.

May be made available by sale after notice to member.

21. Such lien may be made available by a sale of all or any of the shares subject to it, provided that no such sale shall be made, except under a resolution of the directors and until notice in writing shall have been given to the indebted member, or his executors or administrators, requiring him or them to pay the amount
36 for the time being due to the company, and default shall have been made for twenty-eight days from such notice in paying the sums thereby required to be paid.

Application for price.

22. In case of such sale the directors shall apply the clear proceeds, after the payment of any expenses, in or toward satisfaction of such debt, and the residue, if any, shall be paid to the late member, his executors, administrators, or assigns.

Forfeiture of Shares.

Notice to pay call in arrear.

23. If any member fails to pay any call on the day appointed for payment thereof the directors may, at any time thereafter during such time as the call shall remain unpaid, serve a notice on him, requiring him to pay such call, together with the interest and any expenses that may have accrued by reason of such non-payment.

Requisites of notice.

24. The notice shall name a further day, not less than fourteen days after the day first appointed, on or before which such call and all interest and expenses accrued by reason of such non-payment are to be paid. It shall also name the place where the payment is to be made, the place so named being either the register's office of the company or some other place at which the calls of the company are usually made payable. The notice also shall state that in the event of non-payment at or before the time and at the place appointed the shares in respect of which such call was made will be liable to be forfeited.

Forfeiture in case of non-payment.

25. If the requisitions of any such notice as aforesaid be not complied with, any share in respect of which such notice

37 shall have been given may, at any time thereafter before payment of all calls, interest, and expenses due in respect thereof shall have been, be forfeited by a resolution of the directors to that effect.

Forfeiture in case of non-registration of dead or bankrupt members, successors, &c.

26. If any such person as mentioned in article 16 shall not, during three months after being thereto required by notice of the directors, be registered or cause a nominee to be registered under that article, or if, for six months after the death or bankruptcy of a member, no person shall be registered in respect of his or her shares under article 16, the shares may be forfeited by a resolution of the directors to that effect, together with all dividends declared thereon since the death, bankruptcy, or marriage of the late member.

Forfeited shares belong to the company.

27. Any forfeited share shall be deemed to be the property of the company, and may be sold, relotted, or disposed of in such manner as the directors shall think fit.

Owner of forfeited shares to continue liable for calls, &c.

28. Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of forfeiture and the interest thereon.

Evidence of forfeiture or sale.

29. A certificate in writing, under the seal of the company and the hands of two directors, and countersigned by the secretary, that a share has been duly forfeited in pursuance of the regulations of the company, or sold under article 21, shall be conclusive evidence of such forfeiture or sale, and also in favor of the purchaser, of
38 the regularity and validity, so that the remedy of any person aggrieved shall be against the company and in damages only; and an entry of every such certificate shall be made in the minutes of the proceedings of the directors.

Registration of new holder.

30. On any sale by the directors of forfeited shares, or of shares sold under article 21, the purchaser shall be registered as the proprietor of the shares, and shall receive a certificate of such proprietorship under article 7, and shall hold the shares discharged from all calls due prior to this purchase, and he shall not be bound to see to the application of the purchase-money.

Forfeitures may be remitted.

31. The directors may, in their discretion, remit or annul the forfeiture of any share within one year from the date thereof upon payment of all moneys due to the company from the late holder or holders of such share or shares, and all expenses incurred in relation to such forfeiture.

Share warrants.

Issue of share warrants for paid up-shares.

32. The company may issue share warrants in respect of paid-up shares. Subject to these provisions of these articles and of the Companies' Act, 1862, the bearer of a share warrant shall be deemed to be a member of the company to the full extent.

Stamp duty to be borne by members.

33. The stamp duty on every share warrant and all other expenses of or incident to its issue shall be borne by the person applying for it.

Reissue of warrants in case of loss.

34. In case of the loss of any share warrant a new one may be issued to the person claiming in respect, or such person may be entered in the register of members, but only on his producing such evidence of his title and the loss of the warrant as the directors shall consider satisfactory, and on his owing to the company such indemnity with or without security as the directors shall require.

General Meetings.

Ordinary meetings—When to be held.

35. The first ordinary general meeting shall be held at such time within four months after the incorporation of the company as the directors may determine, and thereafter an ordinary general meeting shall be held annually at such time and place as the directors may annually determine.

Extraordinary meetings.

36. The directors may, whenever they think fit, and they shall, upon a requisition made in writing by four or more members of the company holding in the aggregate shares in the nominal amount of one-tenth of the issued capital for the time being of the company, convene in extraordinary general meeting.

Requisition for extraordinary meeting.

37. Any requisition made by the members shall express the object of the meeting proposed to be called and shall be left at the registered office of the company, but no member shall be qualified to sign a requisition who shall be under the disabilities mentioned in article 51 & article 52, or any of them.

Calling of extraordinary meetings.

38. Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within fourteen days from the date of the requisition, the requisitionists, or any

other four or more members holding the required amount of shares, may themselves convene an extraordinary general meeting.

Notice of meeting.

39. The directors or members convening any meeting shall give seven days' notice at least, specifying the place, the day, and the hour of meeting, and, in case of special business, the general nature of such business, to the members in manner hereinafter mentioned, or in such other manner of any as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

Special business.

40. All business shall be deemed special that is transacted at any extraordinary meeting, as well as all business that is transacted at an ordinary meeting, with the exception of choosing a chairman (if necessary), sanctioning a dividend, electing directors and officers, considering the accounts of the report of the directors, and passing any resolutions relating to or arising out of the subject-matter of such report.

Proceedings at General Meetings.

General meetings.

41. No business shall be transacted at any general meeting, except the choice of a chairman (if necessary) and the declaration of a dividend, unless four members shall be present, in person or by proxy, at the time when the meeting proceeds to such business.

41 When no quorum present meeting to be adjourned or dissolved.

42. If within half an hour from the time appointed for the meeting a quorum (as defined by the clause immediately preceding) be not present, the meeting, if convened upon the registration of members, shall be dissolved. In any other case it shall stand adjourned to the same day in the next week at the same time [and] place, and if at such adjourned meeting a quorum be not present it shall be adjourned *sine die.*

Chairman.

43. The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the company.

Temporary chairman.

44. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for the holding of the meeting, the directors present shall choose one of their number to act as chairman, and, that failing, the members present and entitled to vote shall appoint some one of their own number to be chairman.

Meetings may be adjourned.

45. The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

Chairman's decision final unless poll is demanded.

46. At any general meeting, unless a poll is demanded by at least three of the members present in person or by proxy and entitled to vote, a declaration by the chairman that a resolution has
42 been carried and an entry to that effect in the book of proceedings of the company shall be sufficient evidence of the fact without proof of the number of votes recorded in favor of or against such resolution.

Taking of poll.

47. If a poll is demanded by three or more members present in person or by proxy and entitled to vote, it shall be taken in such manner as the chairman directs, and the result of such poll as declared by the chairman shall be deemed to be the resolution of the company in general meeting.

Minute books to be kept.

48. Minutes shall be made in books provided for the purpose of all resolutions and proceedings of general meetings, and any such minutes, if signed by any person purporting to be the chairman of the meeting to which they relate, or by any other person present thereat and appointed by the board of directors to sign the same in his place, shall be receivable as evidence of the facts therein stated without further proof; but if such minutes be signed otherwise than by the chairman of the meeting to which they relate they shall be read to the next succeeding general meeting, and on being found or made correct shall be signed by the chairman thereof.

Votes of Members.

Voting of members.

49. Every member shall have one vote for every share held by him, and in case of an equality of votes at any general meeting or poll the chairman shall, in addition to the votes to which he otherwise may be entitled, have another or casting vote.

Votes of joint members.

43 50. If two or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

Voting by representation of infants, &c.

51. If any member is an infant, pupil, minor, married woman, lunatic, or person of unsound mind, he or she may vote by his or her guardian, tutor, husband, committee or legal curator, or by any one of them; if more than one, such person having previously furnished to the directors such evidence as they shall require of his title to represent such member.

Members in arrears not to vote.

52. No member shall be entitled to vote at any general meeting unless all calls due from him have been paid; and no member shall be entitled to vote in respect to any share that he has acquired by transfer at any meeting held after the expiration of four months from the registration of the company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.

Voting by proxy.

53. Votes may be given either personally or by proxy. No person shall be appointed a proxy who is not a member of the company.

Proxy to be lodged at the office of the company.

54. The instrument appointing a proxy shall be deposited at the registered office of the company not less than three clear
44 days before the time for holding the meeting at which the person named in such instrument proposes to vote. Proxies may either be for one meeting or generally for all meetings.

Forms of instrument of proxy.

55. The instrument appointing a proxy shall be signed by the party making such appointment and may be in the following form, with such variations as circumstances may require:

The Oregonian Railway Company, limited.

I, ——, of ——, in the county of ——, being a member of The Oregonian Railway Company, limited, hereby appoint —— as my proxy to vote for me and on my behalf at the (or all ordinary or extraordinary, as the case may be) general meeting (or meetings, as the case may be) of the company to be held on the —— day of ——, and at any adjournment thereof (or to be held at any time hereafter, as the case may be).

As witness my hand this —— day of ——, 18—.

Directors, and Adoption of Agreement.

Directors, qualifications of.

56. Every member holding not less than two hundred shares of the company upon which all calls for the time being shall have been paid shall be eligible as a director.

Number of directors.

57. The number of directors shall not be less than three or more than six, but this clause shall be construed as being only directory, and the continuing directors may act notwithstanding any number of vacancies.

First directors.

58. The first directors shall be the Right Honorable the Earl of Airlie, K. T., Cortachy Castle, near Kerriemuir; William
45 Lowson, Esq., of Balthayock, merchant, Dundee; Thomas Hunter Cox, Esq., of Duncarse and Maulesden, merchant, Dundee; John Leng, Esq., of Kimbrae, Newport Fife, and Peter Moir Cochrane, merchant, Dundee, who shall act until the annual ordinary meeting in the year 1881.

Remuneration of directors.

59. The remuneration of the directors shall, for each of the first four years after the registration of the company, be equal to three-fourths per cent. on the capital of the company, and thereafter shall be such sum per annum as the members may vote at the first annual meeting after the expiration of the said four years. The said remuneration shall be divided between the directors in such proportions as they may determine: Provided always, That the members may, at any ordinary meeting, resolve that the sum then fixed by them for the remuneration of the directors shall thenceforth be annually appropriated for such remuneration until otherwise altered by a subsequent resolution of the members at some ordinary meeting, and so on from time to time.

Remuneration of directors for extra services.

60. If any director shall be called upon to perform extra services, or to make exertions in going or residing abroad on the company's business, the board may arrange with such director for such special remuneration for such services or exertions either by way of salary, commission, or the payment of a lump sum of money, as they shall think fit.

Agreements by promoters adopted and bonus to promoters.

61. An agreement has been entered into by or on behalf of the directors for the acquisition of the Dayton, Sheridan, and Grande railway, and a contract has also been made by or on behalf
46 of the directors for the construction of 60 miles new railway. The dates and the names of the parties to said contracts or agreements are as follows: (1.) Agreement (for the acquisition aforesaid) between William Lowson, Esq., of Balthoyock, merchant in Dundee, in the county of Forfar, in Scotland, and Peter Moir Cochrane, merchant in Dundee, in said county, for themselves and for all other parties who they have admitted or may admit into the premises, of the first part, and the Oregonian Railway Company, limited

(of Oregon), of the second part, dated 4th March and 1st April, 1880; and (2), contract (for the construction aforesaid) constituted as follows: (*a*) letter or offer by James B. Montgomery for J. B. Montgomery & Co., contractors, Portland, Oregon, dated March 6, 1880, and addressed to the Right Hon. The Earle of Airlie, K. T., and Messrs. William Lowson, Thomas H. Cox, John Leng, and P. M. Cochrane; and (*b*), minutes of meeting of the provisional committee of the Oregonian Railway Company, limited, meaning by that the proposed company, at which meeting were present the said Thomas H. Cox, John Leng, P. M. Cochrane, and William Lowson, and also the said James B. Montgomery, who signs the said minute, dated 8th March, 1880. It is hereby provided that the said contracts or agreements are adopted and shall be adopted and carried out by the company. Further, and as the said agreement for the acquisition aforesaid was negotiated by the said William Lowson, Thomas Hunter Cox, John Leng, and Peter Moir Cochrane at their own risk, and they have also incurred considerable trouble and responsibility, and as the bargain is considered highly advantageous, it is hereby provided that, if within four years from the date of registration of the company it shall be found that the said purchased railway does not cost the company for original purchase price and improve-
47 ment and equipment more than two-thirds the rate per mile of the portion of railway contracted to be constructed, and if on the average over the said period there shall have [been] earned by the company net profits equal to not less than ten per cent. per annum, the said above-named parties shall receive twenty-five per cent. of the gain to the company for the said purchase.

Powers of Directors.

Directors to manage company's business.

62. The business of the company shall be managed by the directors.

Powers of directors.

63. Subject to the restriction herein contained, and in addition to all other powers herein contained, the directors shall have power to do the following things in the name and on behalf of the company:

(*a.*) To carry out and to carry into effect, with all the powers of the company itself, all or any of the objects and powers of the company as expressed in the memorandum of association, as also without prejudice to said generality.

(*b.*) To raise or defend any action, petition, or other legal proceedings, and to abandon, compromise, and settle the same, when and upon such terms as they may deem expedient.

(*c.*) To purchase or acquire or — or lease any property and effects, whether heritable or moveable, real or personal, which they may deem requisite for the purposes of the company, and that either absolutely or perpetually, or for any term of years, and upon such terms and subject to such ground rents, fee duties, rents, or other charges as they may deem expedient, and also to acquire the right

of use of any such property and effects, heritable or move-
48 able, real or personal, as aforesaid.

(*d.*) To erect any houses or buildings, or alter, renew, repair, or improve any houses or buildings, whether erected by the company or not, as they may think desirable or proper for the advantage of the company.

(*e.*) To purchase or acquire the good will and personal property of any kind whatsoever, and the credits and effects of any other person or persons or company carrying on a like business, or to amalgamate with this company any such person or company upon such terms and conditions as they may think fit.

(*f.*) To sell, feu, exchange, sublet, or otherwise dispose of the company's property, whether heritable or moveable, real or personal, or any part thereof, upon any terms they may think fit.

(*g.*) To insure against risk by fire or other risk any building or property of the company.

(*h.*) To execute and sign and issue in the name of the company all deeds of security and other deeds, and all receipts and all other documents and writings they may think necessary, and for that purpose to use the company's seal.

(*i.*) To engage all superintendents, secretaries, treasurers, accountants, solicitors, managers, agents, correspondents, clerks, and servants of the company, and also to discharge the same.

(*j.*) To refer disputes to arbitration, and to compromise debt or claim due to [or] by the company.

(*k.*) To give time to any debtor for payment of his debt.

(*l.*) To take the heritable or moveable, real or personal, property of any debtor, or his equitable interest in any property as a security for the payment, or in satisfaction or in part satisfaction of any debt due by him to the company.

49 (*m.*) To draw, accept, make, renew, and endorse any bill of exchange or promissory note that may be deemed necessary for the purposes or the business of the company.

(*n.*) To enter into any contracts with such persons as they shall think fit, whether such persons shall be members or directors, or the partner or partners of a member or director of the company or not; and every member or director with whom any such contract may be entered into shall be entitled to the profit and the benefit thereof to the same extent as though he were not a member or director of the company.

(*o.*) To accept any conveyance or lease of any property or buildings from any person or persons, whether such person or persons shall be a member or members, or director or directors, or other officers of the company, or his or their partner or partners; and such person shall be entitled to the profit and benefit thereof to the same extent as though he were not a member, director, or officer of the company.

(*p.*) To open a banking account in the name of the company, and every sum paid on behalf of the company, which shall amount to the sum of 20 pounds and upwards, shall be paid by cheque on the bankers of the company, such cheque to be signed by any two directors.

(q.) To provide a common seal, to be kept by such person and in such manners as the directors may think fit.

Directors may establish agencies and appoint officers.

64. The directors may also establish offices, agencies, or local boards in any of the States or counties in which, by the memorandum of association, they are entitled to do or hold anything, and may make such regulations for the management of such offices, agencies, or local boards as they may from time to time think proper, and for that purpose they may appoint local boards, consisting of such persons and possessed of such powers and holding such qualifications as the directors shall from time to time determine; and, farther, the directors may appoint in the United Kingdom, as well as in any of the said States and counties, managers, agents, secretaries, treasurers, officers, clerks, and servants, with such remuneration and at such salary as they may think advisable, and may pay the expenses occasioned thereby out of the funds of the company, and may from time to time discontinue all or any branch offices, agencies, or local boards, and may remove or suspend at any moment all or any of the members of any local board and all or any of the managers, agents, secretaries, treasurers, officers, clerks, or servants of the company for such reason as they may think proper and advisable, and without assigning any cause.

Appointment and powers of president and vice-president.

65. The directors may from time to time appoint a president of the company and also a vice-president, who, in the absence of the president, may act in the president's name and place as the president of the company. All deeds, powers of attorney, instruments, and other documents requiring, according to the law of any State, county, province, or dominion, to be subscribed or executed on behalf of the president of the company alone, or in conjunction with the secretary of the company, may be so subscribed and executed on behalf of, and so as to bind the company by, the president or vice-president appointed as aforesaid, and by the secretary of the company where his subscription is also necessary.

Temporary investments.

66. The directors shall have the power to make temporary investment of the company's funds in the United Kingdom, or in any colony of Her Majesty, or in any foreign State or county, and that in such way or upon such stocks, shares, bonds, debentures, or securities as they may from time to time approve, and they may from time to time realize such temporary investments and invest of new in whole or in part.

Borrowing powers.

67. The directors may from time to time borrow for the purposes of the company such sum or sums of money as they may from time to time think proper, and may make and issue for any money borrowed such bonds, deeds of security, and other deeds, vouchers,

documents, shares, acts, matters, and things as are authorized by the memorandum of association of the company, and as they from time to time consider proper.

Loans to company may be converted into stock.

68. Money may be borrowed for the purposes of the company, with a stipulation, if approved by a general meeting, that the security may be converted into preference or other shares or stock of the company.

Issue of new shares for that purpose.

69. In the event of any moneys being borrowed for the purposes of the company, on the terms of the securities for such money being convertible into shares, the directors may create and issue such new shares, either preferential, ordinary, or deferred, as may be necessary for carrying such conversion into effect.

Signatures of bills of exchange, &c.

70. The directors shall have power, by the signature of the managing director or secretary, with the counter-signature of one of their number, to draw, accept, make, or endorse bills of exchange, drafts, promissory notes, and cheques, and to grant receipts for money borrowed on behalf and for the purposes of the company; but for the purpose of granting interest receipts for money received to be lent on mortgage or bond of the company, and of authenticating notices or reports, allotment letters, coupons, or interest or dividend warrants, the signature of the managing director or secretary alone shall be sufficient, on his being from time to time authorized by the directors accordingly.

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Managing director.

71. The directors shall have power to appoint such person as they may think fit, whether a member of their own body or not, to be managing director, and from time to time revoke such appointment. They may delegate to such managing director all or any of the powers hereby made exercisable by the directors, except those relating to shares and borrowing, and any others as to which special provisions inconsistent with such delegation are herein contained, and they shall have power to fix the remuneration of such managing director.

Amalgamation or sale of company's business.

72. It shall be lawful for the directors, subject always to the sanction of the company, to arrange terms for the amalgamation of the company with any other company, or for the amalgamation of any other company with the company, or for the disposal of the business, estate, and effects of the company, or any part thereof, respectively, to any other company, or for the sale or transference of the business, estate, and effects of any other company, or any part thereof respec-

tively, to the company, and in any such case, upon such terms and in such manner as the directors shall think fit, and the directors shall have power to do all such things as may be necessary for
53 carrying such amalgamation, sale, purchase, or other disposition into effect, so far as a resolution or special resolution of the company is not by law necessary for such purpose, and in case any terms so arranged by the directors include or make necessary the dissolution of the company, the company shall thereupon be dissolved.

Company may purchase business of other companies.

73. The directors may, on behalf of the company, enter into arrangements with the liquidations of any company authorized to make such arrangements as are contemplated by the 161st section of "The Companies' Act of 1862," and they may apply any shares in the capital of the company for the time being unissued for the purpose of carrying out such arrangements.

Foreign seals.

74. The company shall have power to use official common seals, under "The Companies' Seals Act, 1864," in such foreign or other countries as the directors shall determine, and the directors shall have power to appoint any agent or agents, committee or committees abroad, duly authorized agents of the company for the purpose of affixing and using such foreign common seals, and they may impose such restrictions on the use thereof as they shall think fit.

Company's funds not applicable for shares.

75. The company's funds shall not be used in purchasing its own shares.

Directors not to be personally liable, and safety of parties dealing with them.

76. In no case nor under any circumstances shall personal liability attach to any director for anything done or omitted to be done by him in good faith, although loss arise; further, no transaction
54 actually made or entered into on behalf of the company by the directors shall be invalidated or in anyways prejudiced by reason of any breach of the regulations imposed by the preceding articles.

Borrowing Power.

Borrowing not to exceed certain limits.

77. It shall be the duty of the directors to regulate the borrowing of money by the company in such manner that the total amount borrowed shall never exceed a sum equal to one thousand pounds per mile of railway belonging to or in course of construction by the company for the time being: Provided, That every person taking from the company or by assignment any bond or debenture or mort-

gage or other obligation or security of the company shall be entitled to assume without inquiry that no such excess has taken place: And provided further, That no *bona fide* holder of any obligation or security shall be prejudiced by any such excess which may have taken place.

Form of deed.

78. Every deed of security issued by the company for securing money borrowed shall be under the common seal of the company duly stamped. The respective holders of or other persons entitled to such deeds shall proportionably, according to the amount of money secured thereby or contained therein, be entitled to be paid out of the property and assets of the company, including any unpaid capital for the time, the respective sums in such deeds of security mentioned and the interest thereof, without any preference or priority, one above another, by reason of priority of date of any such deeds of security or otherwise howsoever. Providing and declaring also that the capital of the company shall not be called, except for the payment of money borrowed, to a greater extent than 6 per share.

55 Register of deeds.

79. A register of deeds of security and transfers thereof shall be made and kept by the company at its registered office, in which shall be entered the number and date of every such deed and the date of every transfer, and the sums secured, and all other necessary particulars for giving full information with respect to such deeds of security and transfers. Such register may be perused, free of charge, at all reasonable times by any of the holders of bonds or debentures of security whatsoever of the company.

Transfers to be registered.

80. No transfer of a deed of security shall be valid against the company unless and until it be registered in the said register of deeds of security and transfers thereof.

Further provisions as to deeds of security.

81. Without prejudice to what is otherwise contained in these articles or in the memorandum of association, it is hereby provided that the respective lenders to the company, or any of them, may also, either in the principal deeds of security, or separately, or otherwise, receive mortgages or other securities, or bonds, certificates, or obligations granting interests in mortgages or other securities of or upon all or any railway or railroad, and its plant, rolling stock, rates, and revenues, or any of them, belonging to or vested in the company, and that in such form and transferable in such way as may, according to the law of the State in which the premises so to be mortgaged or charged are situated, be competent; and further, and without prejudice as aforesaid, the directors shall have power to grant, execute, and deliver, in name and on behalf of and for the

company, all proper or necessary deeds of trust or mortgage, or other deeds or certificates whatsoever, of or in the premises, and to
56 do and act in all other respects with all the powers of the company.

Disqualification of Directors.

82. The office of director shall be vacated—

(1.) If he ceases to hold the due qualification.

(2.) If he holds any office or place of profit under the company other than that of managing director.

(3.) If he becomes of unsound mind, or bankrupt, or compounds with his creditors, or is convicted of any crime.

Acts of directors not void through latent defects.

83. All acts done by any meeting of directors or of a committee of directors, or by any person acting as a director, or as chairman or deputy chairman of directors, or as chairman of any meeting of directors, or of any committee of directors, shall, notwithstanding that it is afterwards discovered that there was some defect in the appointment of any such director, or person or persons acting as aforesaid, or that they, or any of them, were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Rotation of Directors.

One-third of directors to retire annually.

84. At the ordinary meeting to be held in the year 1881, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being, or the nearest number to one-third, shall retire from office.

Order of retirement.

85. The directors to retire in any year shall always be those who have been longest in office, and in case of equality in that respect shall, unless the directors agree among themselves, be
57 determined by lot.

Re-eligibility.

86. A retiring director shall be re-eligible.

Successors to be appointed.

87. The company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons, unless it is necessary to elect more or fewer in order to give effect to a resolution for altering the number of electors.

Retiring directors to hold office till successors appointed.

88. If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meet-

ing shall stand adjourned until the same day in the next week, at the same time and place; and if at any such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

Number and qualification of directors may be altered.

89. The company may from time to time in general meeting increase or reduce the number of directors and alter the qualification of directors.

Casual vacancies.

90. Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

Proceedings of directors.

Meetings of directors.

58 The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business by the board and committees. Until otherwise fixed the quorum for a board meeting shall be two directors.

Place of meetings.

92. All meetings of directors shall be held in the United Kingdom of Great Britain and Ireland.

Voting at meetings.

93. Questions arising at any meeting of the directors shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote.

A director may call a meeting.

94. A director may at any time summon a meeting of the directors.

Chairman of directors.

95. The directors may elect one of the directors as chairman of the directors and determine the period for which he is to hold office, and may also, if they think fit, choose another director to act as deputy chairman for the same period. If no such chairman or deputy chairman be elected, or if at any meeting the chairman or deputy chairman be not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting. Any chairman or deputy chairman elected as aforesaid shall cease to hold office on becoming disqualified as a director.

Directors may appoint committees.

96. The directors may delegate any of their powers to committees consisting of such members of their body as they think
59 fit. Any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

Chairman of committee.

97. A committee may elect a chairman of their meetings. If no such chairman be elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number present to be chairman of such meeting.

Adjournment of and votes in committee.

98. A committee may adjourn as they may think proper. Questions at any meeting shall be determined by a majority of votes of the members present, and in case of an equal division of votes the chairman shall have a casting vote.

Directors to keep minutes.

99. The directors shall cause minutes to be made in books provided for the purpose:

1st. Of all appointments of officers made by the directors; and,

2nd. Of all orders made by the directors or by committees of directors; and,

3d. Of all resolutions and proceedings of the directors and committees of directors.

And any such minute as aforesaid, if signed by any person purporting to be the chairman of the meeting to which it relates, or of the next meeting of the directors, or of the same committee, shall be receivable in evidence without any further proof.

Dividends or Bonuses and Reserve Fund and General Provisions.

Dividends or bonuses.

100. The directors may, with the sanction of the company in general meeting, from time to time declare a dividend or bonus to the members in proportion to their shares, but no dividend or
60 bonus shall be made except out of net profits as shown upon the balance sheet, which shall from time to time have been examined and passed by the auditor, but it may be either in cash or shares, or partly both.

Interim dividends.

101. The directors may at any time, in any year, pay such sum or sums as they think fit on account or in anticipation of dividend, or by way of interim dividend.

Reserve fund.

102. It shall be in the power of the directors, before recommending any dividend or bonus, to set aside out of the profits of the company such sums as they think proper as a reserve fund to meet contingencies, provide against losses, or for equalizing dividends, or to cover depreciation or diminution in value of any property which shall from time to time be acquired by the company, or for any other purpose of the company sanctioned by the company, and the directors may invest the sum so set apart as a reserve fund upon such securities as they may from time to time approve.

Board may invest in name of trustees.

103. In any case where the board may think fit, purchases or investments of any kind, and whether of general or reserve fund or otherwise, may be made, and conveyances or securities taken and held in the name of trustees to be named by the directors.

Dividends not to be received by members in arrears.

104. No member shall be entitled to receive payment of any dividend or bonus in respect of a share or shares whilst any moneys may be due or owing from him to the company in respect of such
61 share or shares, and any dividend or bonus which, but for this provision, might be payable to him may be set off by the company against the debt owing to the company by such member.

Dividends of joint holders.

105. Every dividend or bonus payable in respect of any share held by several persons jointly may be paid to, and an effectual receipt given by, any of such persons.

Unclaimed dividends.

106. All dividends and bonuses remaining unclaimed for three years after having been declared may, by a resolution of the directors, or of a general meeting, be appropriated to and retained by the company, but the directors may at any time thereafter, if they shall so think fit, as a matter of grace and favor, authorize the payment thereof to any claimant or claimants who shall adduce a title thereto to the satisfaction of the directors.

Dividends not to bear interest.

107. No dividend or bonus shall under any circumstances whatever bear interest against the company.

Dissolution.

How and when company may be dissolved.

108. If the directors shall pass a resolution recommending the company to be dissolved, and a general meeting shall, in pursuance of such recommendation, resolve that the company shall be dis-

solved, and a second general meeting shall confirm that resolution, then the company shall thenceforward subsist and carry on business for the purpose only of winding up its affairs, and its affairs
62 shall be wound up and it shall be dissolved in accordance with and subject to the provisions of "The Companies' Acts, 1862 and 1867," which are and may be applicable to the voluntary winding up of a company under the same on the concurrence of an event on which it is provided that a company under the same may be wound up voluntarily.

Four members may call meeting to consider as to winding up.

109. Further, if four or more members qualified in terms of the thirty-sixth article hereto shall request the directors, in writing, to convene an extraordinary general meeting of the members to consider the propriety and expediency of winding up the company they shall be bound so to do; and if at such meeting it is resolved that the company shall be dissolved and wound up, and a second general meeting shall confirm that resolution, then the course provided in the immediately preceding article shall be followed and carried out.

Dissolution only to be caused by majority of two-thirds in value.

110. The majority necessary to carry any resolution, as set forth in the two immediately preceding articles, shall not be less than two-thirds in value of the members present, personal or by proxy, at the aforesaid meetings.

Accounts.

Accounts to be kept.

111. The directors shall cause true accounts to be kept of the company's business and transactions, and of all sums of money received and expended by the company, and the matters in respect of
63 which such receipt and expenditure take place, and of the credits and liabilities of the company.

Yearly statements.

112. A statement of the company's true financial position, made up yearly to such time in each year as the directors may annually determine, shall be laid before the immediately following ordinary general meeting, and which meeting shall receive and consider the same.

Audit.

Yearly audit.

113. Once at least in every year, namely, preparatory to the annual ordinary general meeting, the accounts of the company shall be examined, and the correctness of the annual financial statement ascertained by one or more auditor or auditors to be appointed by the company.

Auditors—How appointed.

114. The auditor or auditors shall be appointed by the company at the first ordinary meeting of the company, and thereafter at the ordinary general meeting in each year.

Who may be auditors.

115. The auditors need not, but may, be members of the company; but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the company, and no director or other officer of the company is eligible during his continuance in office.

Remuneration and term of office.

116. The remuneration of the auditors and their term of office shall from time to time be fixed by the company in general meeting, and until otherwise ordered by general meeting there shall be only one auditor; but a firm appointed as auditors shall be 64 reckoned as one auditor.

Auditors re-eligible.

117. Any auditor shall be re-eligible on his quitting office.

Vacancy in auditorship.

118. If any casual vacancy occurs in the office of auditor the directors shall supply it.

Auditor's duties.

119. Every auditor shall be supplied with a copy of the annual financial statement, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

Books open to auditors.

120. Every auditor shall have access to all the books and accounts kept by the company. He may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any officer of the company.

Auditor to certify statements.

121. The auditors shall certify to the members the correctness of the annual financial statement, and they may give such information to the members on the state of the company's affairs as they may think fit.

Notices.

Service of notices.

122. A notice may be served by the company upon any member, either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.

Notice to joint holders.

65 123. All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members, and notice so given shall be sufficient notice to all the holders of such share.

Service by post.

124. Any notice if served by post shall be deemed to have been served on the day following that on which the letter containing the same was posted, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

Notice to members out of the Kingdom and of meetings.

125. Any member residing out of the United Kingdom may name an address within the United Kingdom at which all notices shall be served upon him, and all notices served at such address shall be deemed to have been well served; if he shall not have named such address he shall not be entitled to any notice of any general or other meeting whatsoever; and a notice of any meeting advertised in any Dundee newspaper shall be held sufficient notice to all shareholders, wherever residing, of all such meetings.

Notice by advertisement.

126. All notices shall be deemed to have been served upon the holders of stock or share warrants, and upon members residing out of the United Kingdom who have not named an address for service within the United Kingdom, if they shall be advertised in one daily newspaper published in Dundee; and all notices required by
66 law to be given by advertisement shall be advertised in the like newspaper. The company shall not be bound to serve notice on the holder of stock or share warrants, or on such members in any other manner.

Interpretation Clause.

127. In the construction of these articles, unless repugnant to the context, the singular shall include the plural, the masculine the feminine, and *vice versa*, and the words interpretated by the clause shall bear the meanings next hereinafter assigned to them, viz:

Words Interpretated.	*Meanings Assigned Thereto.*
The company	The company established under the memorandum of association to which these articles are annexed.
Capital	The capital for the time being raised or subscribed, or authorized to be raised, for the purposes of the company.

Shares.....The shares of stock into which the capital is divided and interest in the property of the company corresponding with such shares and stock.

Members.....Shareholders for the time being of the company, whether individuals, firms, or companies.

General meetings.....General meetings, whether ordinary or extraordinary, of the members lawfull convened and held in accordance with the regulations for the time being of the company.

67 Persons.....Corporations, companies, and firms, as well as individuals.

Directors.....The directors for the time being of the company.

Secretary.....The secretary for the time being of the company.

Office of the company.....The registered office for the time being of the company.

Month.....The calendar month.

The register of members.....The register of members to be kept pursuant to the statute.

Deed of security or deeds of security.....Any bond, debenture, mortgage debenture, mortgage, trust deed, promissory note secured by trust deed or mortgage, or other deed for borrowed money, or any security of the company whatsover.

Company's regulations.....The regulations for the time being for the management of the company.

Names, addresses, and descriptions of subscribers.

Airlie, of Cortachy Castle, Kirriemuir, in the county of Forfar; William Lowson, of Dundee, in the county of Forfar, merchant; Thomas H. Cox, of Dundee, in the county of Forfar, merchant; John Leng, of Kinbrae, Newport, in the county of Fife, newspaper proprietor; P. M. Cochrane, of Dundee, in the county of Forfar, merchant; Alex. Henderson, of Dundee, in the county of
68 Forfar, merchant; Alex. Nicoll, of Dundee, in the county of Forfar, merchant; James Stevenson, of Dundee, in the county of Forfar, dyer; John M. Watson, of the county of Dundee, in the county of Forfar, stock-broker; William MacKenzie, Dundee, in the county of Forfar, stock-broker.

Dated the 30th day of April, 1880, *years*.

Witness to the above signatures: Wm. Arthur Bell, apprentice to Messrs. Pattulls & Thornton, solicitors, 1 Bank St., Dundee.

And thereupon and thereby the said Oregonian Railway Company, limited, became and is a duly incorporated company, with the

rights, powers, privileges, and franchises mentioned and described in said memorandum and articles of association, and said corporation has its registered office at Dundee, in Scotland, and owns a railroad in the State of Oregon and transacts business in Oregon, and has duly complied with the laws of the State of Oregon for the regulation of foreign corporations doing business therein, and with all the foreign laws hereinbefore set out and referred to.

That at all the times herein mentioned the defendant was and still is a corporation duly incorporated under the general incorporation laws of the State of Oregon, having its principal place of business at the city of Portland, in said State, and that its powers, duties, rights, and franchises are duly set forth and disclosed in the certain articles of incorporation of defendant duly made and executed, which articles of incorporation of defendant are in words and figures and to the effect as follows:

68a *Articles of Incorporation of the Oregon Railway and Navigation Company. Filed June* 13, 1879.

Know all men by these presents that we, the undersigned, Henry Villard, James B. Fry, Artemas H. Holmes, Christian Bors, W. H. Starbuck, and Chas. E. Bretherton, all of the city and State of New York, and H. W. Corbett, C. H. Lewis, J. N. Dolph, Paul Schulze, and H. Thielsen, all of Portland, Oregon, do hereby associate ourselves as a corporation under the general incorporation laws of the State of Oregon, and do hereby adopt the following articles of incorporation:

Article I.

The name of the corporation shall be "The Oregon Railway and Navigation Company."

Article II.

The duration of the corporation shall be ninety-nine years.

68b Article III.

The business of this corporation shall be—

First. To construct and equip the following railroad and telegraph lines, namely: First, a line along the south side of the Columbia river, between Portland and Umatilla; second, a line from Umatilla across the Blue Mountains, through the Grande Ronde Valley, in a southeasterly direction, to a point on the east State line of Oregon, towards Boise City; third, a line from Umatilla to Wallula, in Washington Territory; fourth, a line from Wallula, in Washington Territory, by way of Weston, southwardly, to the point of intersection with the line in Oregon secondly described; fifth, from Walla Walla, in Washington Territory, in a northeasterly direction by Dayton, to the Snake river; sixth, from a point on the Snake river, in Washington Territory, near the mouth of the Palouse river, along the valley of the Palouse river, in a northeasterly direction, to the head waters of the Spokane river; and to maintain and operate such

railroad, telegraph line and branches, carry freight and passengers thereon, and receive tolls for same.

Second. To purchase or consolidate with or lease or operate and maintain, on such terms as may be agreed upon, any railroad or railroads in Oregon, Washington, Idaho, or Utah, with its or their rolling-stock, equipments, or appurtenances, and to complete the same to its authorized terminus.

Third. To facilitate and assist the construction, building, extension, equipment, and operation of any railroad line, steamship line or steamboat line in Oregon, Washington, or Idaho, or steamship line running from Portland to any other ports on the Pacific Ocean, and connecting or intending to connect or exchange traffic with the railroads, steamships, or steamboats of this corporation, and for such purpose to subscribe for or purchase the stocks or bonds of any company owning or operating any such railroads, steamships, or steamboats, to guarantee or otherwise secure the payment of any such bonds or the interest thereon by pledge or mortgage of the property of this corporation, or any part thereof or otherwise, and to consolidate with or to lease or contract for the operation and maintenance of any and all such railroads, steamship, or steam-
68c boat companies so aided, and to obtain from Congress or the Legislatures of Washington, Idaho, and Utah Territories the necessary charters or other legislative authority for the extension of the railroads of this company into said Territories or for the carrying out of any other of the objects herein specified.

Fourth. To build, purchase, and own and run steamships between the ports of Portland, Astoria, Victoria, Sitka, San Francisco, or any other ports in the North Pacific ocean, and steamboats on the Columbia, Willamette, and Snake rivers, and also to build, purchase, and own docks, piers, warehouses, locks, ferry-boats, stages, and other means of transportation in connection with the railroads, steamships, and steamboats above mentioned.

Fifth. To purchase or acquire lands or lots, whether adjacent or contiguous to its railroads, docks, or warehouses or not, and to hold, possess, improve, lease, sell, mortgage, or otherwise dispose of such lands in such manner as may be deemed fit.

Sixth. To borrow money on bonds, notes, or otherwise for the general purposes of the corporation, and to mortgage its railroads, steamships, steamboats, franchises, rolling-stock, and any and all other property to secure the payment thereof.

Seventh. To do all other things necessary or proper for the accomplishment of the objects above specified.

Article IV.

The principal office of the company shall be at Portland, in Oregon.

Article V.

The capital stock of the company shall be six millions ($6,000,000) of dollars (increased to $24,000,000).

Article VI.

Such capital stock shall be divided into sixty thousand share of one hundred dollars each.

Article VII.

Three directors shall form a quorum of the board of directors, whatever may be their number.

Article VIII.

H. W. Corbett, J. N. Dolph, and C. E. Bretherton, or any two of them, are hereby appointed to open stock books, receive subscriptions, and organize the company.

68*d* In witness whereof we have to these presents executed in triplicate, set our hands and seals, this twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

HENRY VILLARD,
By CHAS. E. BRETHERTON,
Attorney-in-Fact.
ARTEMAS H. HOLMES,
By CHAS. E. BRETHERTON,
Attorney-in-Fact.
WILLIAM H. STARBUCK,
By CHAS. E. BRETHERTON,
Attorney-in-Fact.
JAMES B. FRY,
By CHAS. E. BRETHERTON,
Attorney-in-Fact.
CHRISTIAN BORS,
By CHAS. E. BRETHERTON,
Attorney-in-Fact.
CHAS. E. BRETHERTON,
H. W. CORBETT,
C. H. LEWIS,
J. N. DOLPH,
PAUL SCHULZE,
H. THIELSEN,
By CHAS. E. BRETHERTON,
Attorney-in-Fact.

Witnesses:
I. R. MOORES.
C. LANGSTAKE.

68*e* STATE OF OREGON, }
County of Multnomah, } *ss:*

Be it remembered that on this 12th day of June, 1879, before me, the undersigned, a notary public in and for said county and State, personally appeared the within named Chas. E. Bretherton, known to me to be the identical person described in and who executed the within instrument as the attorney-in-fact of Henry Villard, James

B. Fry, Artemas H. Holmes, W. H. Starbuck, H. Thielsen, Christian Bors, and acknowledged to me that he executed the same in the name and as attorney-in-fact of said Henry Villard, James B. Fry, Artemas H. Holmes, W. H. Starbuck, H. Thielsen, and Christian Bors, and as the act and deed of said Henry Villard, James B. Fry, Artemas H. Holmes, W. H. Starbuck, H. Thielsen, and Christian Bors for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and notarial seal, on the day and year above written.

I. R. MOORES,
Notary Public.

STATE OF OREGON, }
County of Multnomah, } *ss:*

Be it remembered that on this 12th day of June, 1879, before me, the undersigned, a notary public in and for said county and State, personally appeared the within named Chas. E Bretherton, H. W. Corbett, C. H. Lewis, J. N. Dolph, and P. Schulze, known to me to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same as their act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and notarial seal, on the day and year above written.

I. R. MOORES,
Notary Public.

Supplementary Articles of Incorporation.

Whereas at the annual meeting of the stockholders of the Oregon Railway and Navigation Company, held at the office of said corporation in the city of Portland, in the State of Oregon, on the 68*f* 19th day of June, A. D. 1882, the following resolutions were, by the vote of the holders of more than three-fourths of the capital stock of said company, and by the unanimous vote of all the stock represented at said meeting, adopted, namely:

Resolved, That the directors of this company be, and they are hereby, instructed and directed to file as soon as they can be reasonably prepared and executed supplementary articles of incorporation amending article III of the present articles of this company by inserting at the end of subdivision VII of article III of the original articles the following subdivisions:

VIII. To construct and equip the following railroad and telegraph lines, namely:

First. A line from the city of Walla Walla, in Washington Territory, in a generally northeasterly direction, to Snake river, at or near Texas Ferry, and thence following the valley of the Snake river to Lewiston, in Idaho Territory, with a branch from a point on said line about three miles south of Grange City in a generally easterly direction to the said city of Lewiston.

Second. A line from the said city of Walla Walla to the town of Pendleton, in the county of Umatilla, in the State of Oregon.

Third. A line from a junction with the present railroad of said

company, between The Dalles and Umatilla, in the State of Oregon, at a point at or near the mouth of John Day's river; up the valley of said river, a distance of about ninety miles, to the big bend of said river, with a branch from said line from a point at or near the mouth of Rock creek; up the valley of said Rock creek to a point about thirty miles distant from the mouth thereof.

Fourth. A line from a junction with the road of said company extending from The Dalles to Umatilla, in the State of Oregon, a or near the mouth of Willow creek; up the valley of Willow creek to the town of Heppner.

Fifth. A line from a point of junction with the present located line of said company's road, from Umatilla to Baker City, at or near the mouth of Butter creek; up the valley of Butter creek to a point thirty miles distant from the said point of junction, and to maintain and operate such railroad and telegraph lines and branches, and carry freight and passengers thereon, and receive tolls for the same.

68*g* Know all men by these presents, that we, the undersigned, Henry Villard, A. H. Holmes, W. H. Starbuck, C. H. Lewis, J. N. Dolph, S. G. Reed, Wm. Endicott, Jr., Geo. M. Pullman, Henry Failing, W. S. Ladd, and C. H. Prescott, being all the directors of the Oregon Railway and Navigation Company, in pursuance of said resolution do hereby adopt the following:

Supplementary Articles of Incorporation of the Oregon Railway and Navigation Company.

The Oregon Railway and Navigation Company hereby adopt the following supplementary articles of incorporation, in addition to its present articles of incorporation, for the purpose of engaging in the new enterprises or business pursuits hereinafter specified, in addition to the enterprises described in the original articles of incorporation, and in the same manner as if there were inserted at the end of subdivision VII of article III of the original articles, the following subdivision:

VIII. To construct and equip the following railroad and telegraph lines, namely:

First. A line from the city of Walla Walla, in Washington Territory, in a generally northeasterly direction, to Snake river, at or near Texas Ferry, and thence following the valley of Snake river to Lewiston, in Idaho Territory, with a branch from a point on said line about three miles south of Grange City in a generally easterly direction to the said city of Lewiston.

Second. A line from the said city of Walla Walla to the town of Pendleton, in the county of Umatilla, in the State of Oregon.

Third. A line from a junction with the present railroad of said company, between The Dalles and Umatilla, in the State of Oregon, at a point at or near the mouth of John Day's river; up the valley of said river, a distance of about ninety miles, to the big bend of said river, with a branch from said line from a point at or near the mouth of Rock creek; up the valley of said Rock creek to a point about thirty miles distant from the mouth thereof.

Fourth. A line from a junction with the road of said company extending from The Dalles to Umatilla, in the State of Oregon, at or near the mouth of Willow creek; up the valley of Willow creek to the town of Heppner.

68*h* Fifth. A line from a point of junction with the present located line of said company's road, from Umatilla to Baker City, at or near the mouth of Butter creek; up the valley of Butter creek to a point thirty miles distant from the said point of junction, and to maintain and operate such railroad and telegraph lines and branches, and to carry freight and passengers thereon, and receive tolls for the same.

In witness whereof we have to these presents executed in triplicate, set our hands and seals, this 3d day of July, in the year of our Lord one thousand eight hundred and eighty-two.

(Signed)	H. VILLARD.	[SEAL.]
(Signed)	ARTEMAS H. HOLMES.	[SEAL.]
(Signed)	W. H. STARBUCK.	[SEAL.]
(Signed)	C. H. LEWIS.	[SEAL.]
(Signed)	J. N. DOLPH.	[SEAL.]
(Signed)	S. G. REED.	[SEAL.]
(Signed)	WM. ENDICOTT, JR.	[SEAL.]
(Signed)	GEO. M. PULLMAN.	[SEAL.]
(Signed)	HENRY FAILING.	[SEAL.]
(Signed)	W. S. LADD.	[SEAL.]
(Signed)	C. H. PRESCOTT.	[SEAL.]

In presence of—

(Signed) W. T. HUME.
(Signed) JOSEPH SIMON.

Signed and sealed by—

H. VILLARD,
A. H. HOLMES,
W. H. STARBUCK,
S. G. REED,
WM. ENDICOTT, JR., AND
GEO. M. PULLMAN.

In the presence of—

(Signed) H. H. TYNDALE.
(Signed) C. H. SPOFFORD.

68*i* STATE OF OREGON, } *ss:*
County of Multnomah, }

Be it remembered that on this 3d day of July, A. D. 1882, before the undersigned, a notary public in and for said county and State, personally appeared the above-named C. H. Lewis, J. N. Dolph, Henry Failing, W. S. Ladd, and C. H. Prescott, who are known to me to be the identical persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and seal the day and year above written.

[SEAL.] (Signed) W. T. HUME,
Notary Public in and for the State of Oregon.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this 1st day of August, 1882, before me, Hector H. Tyndale, a commissioner of the State of Oregon in and for the State of New York, personally appeared the above-named Henry Villard, Artemas H. Holmes, William H. Starbuck, Simeon G. Reed, William Endicott, Jr., and George M. Pullman, who are known to me to be the persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal on the date above written.

[SEAL.] (Signed) HECTOR H. TYNDALE,
Commissioner for Oregon in New York.

69 That on or about the first day of August, 1881, by an indenture of lease of that date, the plaintiff being thereto duly authorized under the laws aforesaid and of this State, and under the memorandum and articles of association hereinbefore set forth, demised unto the defendant a certain railway or railroad, the same being the railroad owned by the plaintiff and in the State of Oregon as aforesaid, together with certain stations, depots, and other property connected therewith and belonging thereto, the property of plaintiff, for a term of ninety-six years from the date thereof, and the defendant being thereto duly authorized by law and its said articles of incorporation, and by the resolution of its board of directors in consideration thereof, did, by the terms of said indenture of lease, covenant and agree, among other things, to pay to the plaintiff therefor the yearly rental of twenty-eight thousand pounds sterling of Great Britain, in equal half-yearly payments, on the fifteenth of May and eleventh of November in each year, in advance.

That upon the execution of said indenture of lease the said defendant entered into possession of said demised property, and has continued in the enjoyment of the same to the present time, but that on the fifteenth of May, 1884, the defendant, pretending that neither it nor the plaintiff was authorized or empowered by law to enter into said indenture of lease, tendered and offered to restore possession of said demised property to plaintiff in its then condition, but that at the time of so tendering and offering to restore said property the same was not in equally good condition as to repair, equip-
70 ment, and value to the plaintiff as when received by the defendant and as contemplated by the terms of said leasing, and the defendant pretended to disavow said lease.

That thereupon plaintiff would not accept said surrender so offered by defendant, but requested defendant to continue in the possession

of said property and road and operate the same, to prevent losses which might otherwise result from suddenly discontinuing such operation, upon the understanding that no act by the said defendant in continuing the operation of said road should in any manner prejudice or work any disadvantage to said defendant in the position taken by it aforesaid, or in any position it might thereafter take in respect to said lease, in any suit, action, or proceeding; and on the further understanding that the plaintiff thereby made no admission that the said lease is other than valid and binding in all particulars, and that such operation of the road by the defendant should in no way prejudice the rights of the plaintiff under or in respect of said lease.

That upon said understanding defendant consented to retain its possession of said property; that a written memorandum of said understanding and consent was entered into between the plaintiff, acting by its agent in that behalf, and the defendant, which memorandum was in the words and figures and to the effect following, that is to say:

Memorandum.

The Oregon Railway and Navigation Company having asserted the legal invalidity of the lease executed to that company by the Oregonian Railway Company, limited, dated August,
71 1881, and disavowed and disclaimed any obligation thereunder, and having offered to restore, and tendered to the company last mentioned, the property purporting to be demised by said lease, and Edmund Robertson, representing the said Oregonian Company, having requested Mr. T. Jefferson Coolidge, president of the said Oregon Railway and Navigation Company, to continue the operation of the railroad purporting to be demised by said lease, for the purpose of preventing embarrassments and losses which might result from suddenly discontinuing the operation of the said railroad, Mr. Coolidge has expressed his willingness to use his efforts to procure the operation of said road, to be continued for the period of six months from the present time, so far as the same may be accomplished without serious loss to the Oregon Railway and Navigation Company; but it is understood that he incurs hereby no legal obligation, either personally or on behalf of said company; and it is also understood that no act by him or by said Oregon Railway and Navigation Company in so continuing the operation of said road shall in any manner prejudice or work any disadvantage to said Oregon Railway and Navigation Company in the position taken by said company as aforesaid, or in any position it may hereafter take, in respect to said lease, in any suit, action, or proceeding, or otherwise. It is further expressly understood that the said Edmund Robertson, on behalf of the Oregonian Railway Company, makes no admission that the said lease is other than valid and binding in all particulars, and that this paper shall in no way prejudice the rights of the Oregonian Railway Company under or in respect of said lease.

72 Dated May 15th, 1884, New York.

T. JEFFERSON COOLIDGE,
Pres. O. R. & N. Co.
EDMUND ROBERTSON,
Attorney-in-fact for the Oregonian Railway Company, Limited.

That the defendant has been in possession of said demised property from the date of said indenture of lease to the present time.

That, though requested thereto by the plaintiff, the defendant has refused and neglected to pay to plaintiff the sum of fourteen thousand pounds sterling, the installment of rent, which, as aforesaid, became due under said indenture of lease on the fifteenth of May, 1884, and the same and the whole thereof remains due and unpaid.

That the equivalent of said sum of fourteen thousand pounds sterling is the sum of $68,131.00.

Wherefore plaintiff prays judgment against said defendant for said sum of $68,131.00, in lawful money of the United States, with lawful interest thereon from and after the said 15th day of May, 1884, and for the costs and disbursements of this action.

H. H. NORTHUP, W. B. GILBERT,
J. W. WHALLEY, & PAUL R. DEADY,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

I, Hugh Roger, being first duly sworn, say I am the managing agent of the plaintiff above named, within the State of Oregon, and that the foregoing amended complaint is true as I verily believe.

HUGH ROGER.

Subscribed and sworn to before me this 15th day of August, 1884.

[SEAL.] PAUL R. DEADY,
Notary Public for Oregon.

73 Due service of a copy of the above-amended complaint, if hereby admitted to have been duly made on me, at Portland, Multnomah county, Oregon, on this 15th August, 1884.

DOLPH, BELLINGER,
MALLORY, AND SIMON.

Endorsed: Filed Aug. 15th, 1884. R. H. Lamson, clerk.

73½ And afterwards, to wit, on Monday, the 18th day of August, 1884, the same being the 55th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

74 THE OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

AUGUST 18, 1884.

Now at this day comes the defendant in the above-entitled cause, by Mr. Cyrus A. Dolph, of counsel, and, upon motion of said defendant, it is ordered that it have until September 5th next in which to demur or answer.

74½ And afterwards, to wit, on the 5th day of September, 1884, there was duly filed in said court an answer to amended complaint in words and figures as follows, to wit:

75 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

The defendant answers to the amended complaint herein:

That it has no knowledge or information sufficient to form a belief as to whether the plaintiff was at any time or is a corporation created or existing under or by virtue of an act of Parliament of the United Kingdom of Great Britain and Ireland, entitled an act for the incorporation, registration, and winding up of trading companies and associations, dated and passed August 7th, 1862, and of the acts amendatory thereof, or as to whether plaintiff at any time was or is a corporation by virtue of any act of said Parliament, or as to whether plaintiff at any time was or is at all a corporation.

That defendant has no knowledge or information sufficient to form a belief as to whether the persons in the amended complaint mentioned, or as to whether any persons, on the 3d day of April, 1880, or at any time, in pursuance of any provision of the said alleged companies' act, or of the provisions of any act of said Parliament, or at all, made or entered into or executed any memorandum of association entitled "A memorandum of association of the Oregonian Railway Company, Limited," or as to whether any memorandum of association was at all made, executed, or entered into at any
76 time in words or figures or effect as recited and set forth in said amended complaint.

That defendant has no knowledge or information sufficient to form a belief as to whether the persons in said amended complaint mentioned, or as to whether any persons, on the 30 day of April, 1880, or at any time, in pursuance of any provisions of the said alleged or of any act of the said Parliament, or at all, made or entered into or executed any articles of association or delivered any articles of association to the registrar of joint stock companies, as required by section 17 of said alleged act, or otherwise, or as to whether said registrar did at any time retain or register any memorandum or articles

of association or certified the said Oregonian Railway Company, Limited, to be incorporated or to be limited, or as to whether any articles of association were at any time made, executed, or entered into in words or figures or effect as set forth in said amended complaint.

That defendant denies that plaintiff became or is vested with the rights, powers, or franchises to build, construct, reconstruct, divert, equip, own, operate, lease, sue, transfer, or dispose of or purchase or otherwise acquire, hold, operate, use, work, or deal in any railway or railways, railroad or railroads, or branch or extension thereof, or telegraph or telephone lines, warehouse or warehouses, or building or buildings for receiving or storing grain or other produce in the States of Oregon, California, or Nevada, or in the Territories of Washington or Idaho, or of carrying passengers or freight in either of said States or Territories; and that defendant has no knowledge or information sufficient to form a belief as to whether said plaintiff
77 became or is an incorporated company, or had or has any of the other rights, powers, privileges, or franchises mentioned or described in said alleged memorandum or articles of association.

That defendant has no knowledge or information sufficient to form a belief as to whether plaintiff has its or any registered office at Dundee, in Scotland, or elsewhere, or transacts business in the State of Oregon, or has complied with the laws of said State for the regulation of foreign corporations doing business therein, or with the foreign laws as set out in said complaint, or has complied with any foreign law so as to entitle or authorize it to transact business in this State or elsewhere.

That defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff owns a railroad in the State of Oregon.

That defendant admits that it is and was during the times in the complaint mentioned *was* a corporation duly incorporated under the laws of the State of Oregon; but defendant denies that it ever had or has the power, right, or franchise to purchase or lease any railroad or railroads in the State of Oregon.

That defendant denies that any time plaintiff demised unto it the railroad or railway in the complaint mentioned, and defendant alleges that about the 1st day of August, 1881, the president and assistant secretary of the defendant signed an instrument in writing and affixed thereto defendant's corporate seal, which inst ument was in its terms such an indenture of lease as is described in
78 the amended complaint, and is, in fact the instrument so described; but defendant denies that either plaintiff or defendant was at any time authorized to enter into said or any indenture of leasing, and defendant alleges that both the plaintiff and the defendant were without the power or authority to enter into such contract; that the State of Oregon did not authorize or consent to such contract of leasing or to any leasing by the plaintiff or taking in lease by the defendant of the said railway, and the said pretended agreement was unauthorized and void.

That it is true defendant, upon the execution of said pretended

lease, entered into possession of the said railway, and so continued to the 15th day of May, 1884, but defendant denies that since said last-named date it has or now is in possession of the same, under or in pursuance of the said pretended lease.

And the defendant alleges that at all times since said 15th of May, 1884, it has had, and now has, possession of said railway property, in pursuance of the memorandum of agreement between T. Jefferson Coolidge, as president of defendant, and Edmund Robertson, as attorney-in-fact for plaintiff, which memorandum is set forth in the amended complaint.

Defendant denies that at the time of tendering and offering to restore said property the same was not in equally good condition as to repair, equipment, or value as when received from plaintiff by defendant.

Defendant denies that any sum of money is unpaid and due plaintiff from defendant, and it alleges that it has fully paid the rental provided for in the said pretended lease for the full period
79 during which it held possession of said railway under the same, being for the period ending on said 15th day of May, 1884.

Wherefore defendant prays for judgment against plaintiff for its costs and disbursements herein.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Att'ys for Def't.

STATE OF OREGON, } ss:
County of Multnomah, }

I, Theodore Wygant, being first duly sworn, say I am the secretary of the defendant, and that I have read the foregoing answer, and I believe the same to be true.

THEODORE WYGANT.

Subscribed and sworn to before me this 5th day of September, A. D. 1884.

[SEAL.]

W. T. HUME,
Notary Public in and for Oregon.

Service upon us of a copy of the within answer this day is hereby admitted.

September 5, 1884.

WHALLEY, NORTHUP, AND DEADY,
Of Counsel for Plaintiff.

(Endorsed:) Filed Sept. 5, 1884. R. H. Lamson, clerk.

79½ And afterwards, to wit, on the 6th day of September, 188–, there was duly filed in said court a stipulation in words and figures as follows, to wit:

80 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

It is agreed by and between the plaintiff and the defendant in the above-entitled cause that the plaintiff may have ten days from this date in which to move, demur, plead, or reply to the answer of defendant to the amended complaint in this cause.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Def't's Att'ys.

(Endorsed:) Filed Sept. 6, 1884. R. H. Lamson, clerk.

80½ And afterwards, to wit, on the 9th day of September, 1884, there was duly filed in said court a demurrer in words and figures as follows, to wit:

81 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

And now comes the above-named corporation, plaintiff, by its attorneys Northup & Gilbert and J. W. Whalley, and demurs to the answer of the defendant herein filed, for the reason that said answer constitutes no defence to the cause of action in the complaint alleged.

NORTHUP AND GILBERT AND
J. W. WHALLEY,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Oregon, } *ss:*

Due service of the within demurrer is hereby admitted to have been made on us at Portland, Multnomah county, Oregon, on this the 9th day of September, 1884.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Def't's Att'ys.

(Endorsed:) Filed Sept. 9, 1884. R. H. Lamson, clerk.

81½ And afterwards, to wit, on the 9th day of September, 1884, there was duly filed in said court a notice in words and figures as folllows, to wit:

82 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

To the above-named defendant and to Messrs. Dolph, Bellinger, Mallory, and Simon, its attorneys.

GENTLEMEN: Take notice that on Monday, the 15th day of September, 1884, at the hour of ten o'clock a. m. of said day, or as soon thereafter as counsel can be heard, the plaintiff, by its attorneys, will at the United States circuit court room, move the above-entitled court to set down for hearing at a day certain the demurrer herein filed by the plaintiff to the answer of the defendant.

Respectfully yours,

NORTHUP & GILBERT AND
J. W. WHALLEY,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA, *District of Oregon:*

Due service of the within notice is hereby admitted to have been made on us at Portland, Oregon, on this 9th day of September, A. D. 1884.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Def't's Att'ys.

(Endorsed:) Filed Sept. 9, 1884. R. H. Lamson, clerk.

82½ And afterwards, to wit, on the 11th day of September, 1884, there was duly filed in said court a stipulation in words and figures as follows, to wit:

83 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited,
Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY,
Defendant. } No. —.

It is hereby stipulated and agreed by and between the plaintiff and defendant herein, acting by and through their respective attorneys, that the demurrer to the answer herein filed shall be heard,

the court consenting, on the first day the above-entitled court shall meet after Saturday, the 20th day of September, A. D. 1884.

NORTHUP & GILBERT &
J. W. WHALLEY,
Att'ys for Plaintiff.
DOLPH, BELLINGER,
MALLORY, AND SIMON,
Att'ys for Def't.

(Endorsed:) Filed Sept. 11, 1884. R. H. Lamson, clerk.

83½ And afterwards, to wit, on Monday, the 15th day of September, 1884, the same being the 69th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

84 OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

SEPTEMBER 15, 1884.

Now at this day comes the plaintiff in the above-entitled cause, by Mr. John W. Whalley, of counsel, and the defendant, by Mr. Charles B. Bellinger, of counsel, and, upon motion of said defendant, it is ordered that said defendant be, and it is hereby, allowed to withdraw its answer to the amended complaint herein, and to file an amended answer thereto.

84½ And afterwards, to wit, on the 16th day of September, 1884, there was duly filed in said court [an] answer in words and figures as follows, to wit:

85 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

The defendant answers to the amended complaint herein:

That it has no knowledge or information sufficient to form a belief as to whether the plaintiff was at any time or is a corporation created or existing under or by virtue of an act of Parliament of the United Kingdom of Great Britain and Ireland, entitled an Act for the incorporation, registration, and winding up of trading companies and other associations, dated and passed August 7th, 1862, and of the acts amendatory thereof, or as to whether plaintiff at any time was or is a corporation, by virtue of any act of said Parliament, or as to whether plaintiff at any time was or is at all a corporation.

That defendant has no knowledge or information sufficient to form a belief as to whether the persons in the amended complaint mentioned, or as to whether any persons, on the 30th day of April, or at any time, in pursuance of any provision of the said alleged Compa-

nies' Act, or of the provisions of any acts of said Parliament, or at all made or entered into or executed any memorandum of association, entitled "A memorandum of Association of the Oregonian Railway Company, limited," or as to whether any memorandum of association was at all made, executed, or entered into at any time in
86 words or figures or effect as recited and set forth in said amended complaint.

That defendant has no knowledge or information sufficient to form a belief as to whether the persons in the said amended complaint mentioned, or as to whether any persons on the 30th day of April, 1880, or at any time, in pursuance of any provision of the said alleged or of any act of the said Parliament, or at all, made or entered into or executed any articles of association or delivered any articles of association to the register of joint stock companies, as required by section 17 of said alleged act, or otherwise, or as to whether such register did at any time retain or register any memorandum or articles of association, or certified the said Oregonian Railway Company, limited, to be incorporated or to be limited, or as to whether any articles of association were at any time made, executed, or entered into in words or figures or effect as set forth in said amended complaint,

That defendant denies that plaintiff became or is vested with the powers, privileges, or franchises to build, construct, reconstruct, divert, equip, own, operate, lease, sell, transfer, or dispose of, or purchase, or otherwise acquire, hold, operate, use, work, or deal in any railway or railways, railroad or railroads, or branch or extension thereof, or telegraph or telephone lines, warehouse or warehouses or building or buildings for receiving or storing grain or other produce in the State of Oregon, California, or Nevada or in the Territories of Washington or Idaho, or of carrying passengers or freight in either of said States or Territories; and that defendant has no knowledge or information sufficient to form a belief as to whether
87 said plaintiff became or is an incorporated company, or had or has any of the other rights, powers, privileges, or franchises mentioned or described in said alleged memorandum or articles of association.

That defendant has no knowlegde or information sufficient to form a belief as to whether plaintiff has its or any registered office at Dundee, in Scotland, or elsewhere, or transacts business in the State of Oregon, or has complied with the laws of said State of Oregon for the regulation of foreign corporations doing business therein or with the foreign laws as set out in said complaint, or has complied with any foreign law so as to entitle or authorize it to transact business in this State or elsewhere.

That defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff owns a railroad in the State of Oregon.

That defendant admits that it is, and was during the times in the complaint mentioned, a corporation duly incorporated under the laws of the State of Oregon, but defendant denies that it ever had or

has the power, right, or franchise to purchase or lease any railroad or railroads in the State of Oregon.

That defendant denies that at any time plaintiff demised unto it the railway or railroad in the complaint mentioned, and defendant alleges that about the first day of August, 1881, the president and assistant secretary of the defendant signed an instrument in writing and affixed thereto defendant's corporate seal, which instrument was in its terms such an indenture of lease as is described in the
88 amended complaint, and is, in fact, the instrument so described; but defendant denies that either plaintiff or defendant was at any time authorized to enter into said or any indenture of leasing; and defendant alleges that both the plaintiff and the defendant were without the power or authority to enter into such contract; that neither the president nor secretary of the defendant had authority to execute, for or on behalf of defendant, such or any indenture of lease; that the State of Oregon did not authorize or consent to such or any contract of leasing by plaintiff or taking in lease by defendant of the said railway; that the stockholders of defendant did not at any time assent thereto, nor did a majority of them so do, and that the said pretended agreement was unauthorized and void.

That it is true that defendant, upon the execution as aforesaid of said pretended lease, entered into possession of said road and so continued to the 15th of May, A. D. 1884, but defendant denies that since said last-named date it has been or now is in possession of the same under or in pursuance of the said pretended lease, or otherwise than at the special request of plaintiff for the accommodation of plaintiff, and solely to prevent losses which might otherwise result to plaintiff from discontinuing the operation of such road, and in accordance with the terms of a written memorandum of agreement entered into on said day by the defendant through its president and the plaintiff through Edmund Robertson, its attorney-in-fact, which memorandum of agreement is as set forth in the complaint.

89 And defendant alleges that at all times since the said tender of possession by defendant to plaintiff it has had and now has possession of said railway and property in said instrument pretended to be demised solely in pursuance of the said agreement of May 15th, 1884.

That defendant denies that at the time of tendering and offering to restore said property the same was not in equally good condition as to repair, equipment, or value as when received by defendant.

Wherefore defendant prays judgment against plaintiff for its costs and disbursements herein.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Attorneys for Defendant.

STATE OF OREGON,
County of Multnomah, } *ss:*

I, Theodore Wygant, being first duly sworn, say I am the secre-

tary of the defendant above named; that I have read the foregoing answer, and the same is true, as I verily believe.

THEODORE WYGANT.

Subscribed and sworn to before me this 15th day of September, A. D. 1884.

W. T. HUME,
Notary Public in and for Oregon.

Endorsed: Filed Sept. 16, 1884. R. H. Lamson, clerk.

89½ And afterwards, to wit, on the 17th day of September, 188–, there was duly filed in said court a demurrer in words and figures as follows, to wit:

90 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,

vs.

THE OREGON RAILWAY & NAVIGATION COMPANY, Defendant.

Now comes the plaintiff above named, by and through its attorneys, Whalley, Northup, and Deady, and demurs to the amended answer to the amended complaint filed herein on the 16th day of September, 1884, for the reason that the said amended answer does not constitute a defense to the action.

W. B. GILBERT & WHALLEY,
NORTHUP AND DEADY,
Att'ys for Plaintiffs.

Service of a copy of the foregoing demurrer is hereby accepted and acknowledged this 16th day of September, 1884.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Atty's for Def't.

U. S. OF AMERICA, }
District of Oregon, } *ss:*

We, the undersigned, hereby certify that we have examined the foregoing demurrer, and deem that the same is well taken in point of law.

WHALLEY, NORTHUP, AND DEADY.

Endorsed: Filed Sept. 17, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

90½ And afterwards, to wit, on the 17th day of September, 1884, there was duly filed in said court a stipulation in words and figures as follows, to wit:

91 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

It is hereby stipulated and agreed by and between the parties to this action, by and through their respective attorneys, that the demurrer filed herein to the amended answer filed herein, the court consenting, shall be heard on the 7th day of October, 1884.

W. B. GILBERT & WHALLEY,
NORTHUP & DEADY,
Att'ys for Plaintiff.
DOLPH, BELLINGER,
MALLORY, AND SIMON,
Att'ys for Defendant.

(Endorsed:) Filed Sept. 17, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

91½ And afterwards, to wit, on the 24th day of September, 1884, there was duly filed in said court a notice in words and figures, as follows, to wit:

92 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

To the above-named defendant corporation and to Messrs. Dolph, Bellinger, Mallory, and Simon, its attorneys:

Please take notice that on Wednesday, the 24th day of September, A. D. 1884, at the hour of 10 o'clock a. m. of said day, or [as] soon thereafter as application can be heard, the above-named plaintiff will, by its attorneys undersigned, apply to the clerk of the above-entitled court, at his office in the city of Portland, in the district of Oregon, for the issuance by him of a commission to some proper person in Dundee, Scotland, in the United Kingdom of Great Britain, to be chosen by said clerk, in the want of parties not — on the person to whom said commission shall issue, to take on behalf of the plaintiff herein the testimony by deposition of the following-named witnesses, namely: Thomas Thornton, solicitor, of Dundee, Scotland; David Ferguson, secretary Oregonian Railway Company, limited, residing at Dundee, Scotland, and John J. Reid, registrar of joint stock companies, residing in Edinburg, Scotland; said testimony when taken to be read and used on the trial of this cause on behalf of the plaintiff; all or either of them to be examined for the

plaintiff upon the direct interrogatories to be attached to said commission, and such cross-interrogatories as you may propose, to be allowed by said clerk.

93 Very respectully, yours,

NORTHUP & GILBERT &
J. W. WHALEY,
Attorneys for Plaintiff.

DISTRICT OF OREGON, *ss:*

Service of the foregoing notice is hereby accepted at Portland, in said district of Oregon, this the 19th day of September, A. D. 1884, and all further service is hereby waived.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Attorneys for Defendant.

Endorsed: Filed Sept. 24, 1884. R. H. Lamson, clerk.

93½ And afterwards, to wit, on the 27th day of September, 1884, there was duly filed in said court objections to interrogatories in words and figures as follows, to wit:

94 In the Circuit Court of the United States, for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

Defendant objects to each of the interrogatories in paragraph numbered two of the interrogatories filed herein by plaintiff, to be propounded to David Ferguson, of Dundee, Scotland, on the ground that the evidence proposed to be elicited by each of the said interrogatories is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 3 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited by each of the said interrogatories is incompetent.

Defendant objects to interrogatory numbered 4 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories numbered 5 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to interrogatory numbered 6 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

95 Defendant objects to each of the interrogatories in paragraph numbered 7 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 8 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 9 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 10 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 11 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 12 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to the interrogatory numbered 13 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to the several interrogatories filed as aforesaid, and to each of the same, on the ground that the evidence proposed to be elicited thereby is incompetent.

DOLPH, BELLINGER,
MALLORY & SIMON,
Attorneys for Defendant.

96 Due service of a copy of the written objections to interrogatories is hereby acknowledged, in the city of Portland, Multnomah county, State of Oregon, this September 27th, A. D. 1884.

H. H. NORTHUP,
Of Att'ys for Plaintiff.

Endorsed: Filed September 27th, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

96½ And afterwards, to wit, on the 27th day of September, 1884, there was duly filed in said court objections to interrogatories in words and figures as follows, to wit:

97 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

Defendant objects to each of the interrogatories in paragraph numbered 2 of the interrogatories filed herein by plaintiff, to be propounded to Thomas Thornton, solicitor, residing at Dundee, Scotland, on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph num-

bered 3 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to interrogatory numbered 4 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 5 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to interrogatory numbered 6 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 7 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

98 Defendant objects to each of the interrogatories in paragraph numbered 8 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to interrogatory numbered 9 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to interrogatory numbered 10 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to the interrogatory numbered 11 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 12 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 13 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to each of the interrogatories in paragraph numbered 14 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to interrogatory numbered 15 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

99 Defendant objects to each of the several interrogatories filed as aforesaid on the ground that the evidence thereby proposed is incompetent.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Attorneys for Defendant.

Due service of a copy of the written objections to interrogatories is hereby acknowledged in the city of Portland, Multnomah county, Oregon, this September 27th, 1884.

H. H. NORTHUP,
Of Att'ys for Pl'ff.

Endorsed: Filed Sept. 27th, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

99½ And afterwards, to wit, on the 27th day of September, 1884, there was duly filed in said court objections to interrogatories in words and figures as follows, to wit:

100 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

Defendant objects to interrogatory numbered 2 of the interrogatories filed herein by plaintiff to be propounded to John J. Reid, of Edinburg, Scotland, on the ground that the evidence proposed to be elicited thereby as incompetent.

Defendant objects to interrogatory numbered 3 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

Defendant objects to interrogatory numbered 4 of the interrogatories filed as aforesaid on the ground that the evidence proposed to be elicited thereby is incompetent.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Attorneys for Defendant.

Due service of a copy of the written objections to interrogatories is hereby acknowledged at the city of Portland, Multnomah county, Oregon, on this Saturday, September 27th, 1884.

NORTHUP & GILBERT &
J .W. WHALLEY, *for Pl'ff,*
By H. H. NORTHUP.

Endorsed: Filed Sept. 27th, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

100½ And afterwards, to wit, on the 29th day of September, 1884, there was duly filed in said court a notice in words and figures as follows, to wit:

101 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

To the above-named defendants, and to Messrs. Dolph, Bellinger, Mallory and Simon, its attorneys:

Please take notice that on Monday, the 6th day of October, A. D.

1884, or as soon thereafter as counsel can be heard, at the court-room of the above-entitled court, in Portland, in the District of Oregon, at the hour of ten o'clock a. m. of said 6th day of October, 1884, the above-named plaintiff will, by its counsel, make an application to the Hon. Matthew P. Deady, judge of said court, to settle the interrogatories to be addressed to witnesses, Thomas Thornton, John J. Reid, and Daniel Ferguson, and to be attached to the commission allowed herein.

Dated this September 29th, 1884.

NORTHUP & GILBERT AND
J. W. WHALLEY,
Attorneys for Plaintiff.

Service of the foregoing notice, by a duly certified copy, accepted at Portland, in said county and district, this 29th day of September, A. D. 1884.

DOLPH, BELLIGER,
MALLORY & SIMON,
Attorneys for the Defendant Above.

(Endorsed:) Filed Sept. 29, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

101½ And afterwards, to wit, on Tuesday, the 7th day of October, 1884, the same being the 2nd judicial day of the regular October term of said court--present, the Honorable Lorenzo Sawyer, U. S. circuit judge, and the Honorable Matthew P. Deady, United States district judge presiding—the following proceedings were had in said case, to wit:

102 THE OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

OCTOBER 7, 1884.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. John W. Whalley and Mr. William B. Gilbert, of counsel, and the defendant, by Mr. Cyrus A. Dolph and Charles B. Bellinger, of counsel, and this cause comes on to be heard upon the demurrer to the amended answer herein; and the court having heard the arguments of the counsel will advise thereof.

102½ And afterwards, to wit, on Wednesday, the 8th day of October, 1884, the same being the 3d judicial day of the regular October term of said court—present, the Honorable Lorenzo Sawyer, U. S. circuit judge, and the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

103 THE OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

OCTOBER 8, 1884.

This cause having heretofore been heard upon the demurrer to the amended answer herein, and argued by Mr. John W. Whalley and Mr. William B. Gilbert, of counsel for plaintiff, and by Mr. Cyrus A. Dolph and Mr. Charles B. Bellinger, of counsel for defendant, and taken under advisement by the court; and now, at this day, the court being fully advised in the premises, it is ordered that the said demurrer be, and the same is hereby, overruled; and, upon motion of said plaintiff, it is ordered that it be, and it hereby is, allowed to file a motion to strike out the amended answer herein as frivolous; and, upon motion of said defendant, it is ordered that it have until the eighteenth instant to amend or withdraw its said answer.

103½ And afterward, to wit, on the 14th day of October, 1884, there was duly filed in said court a motion in words and figures as follows, to wit:

104 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

And now comes the plaintiff above named, by its attorneys, and, upon leave of the court for that purpose first had and obtained, moves the court upon the pleadings and record in this cause to strike out the last amended answer of the defendant herein filed for the reasons following:

1st. Said last amended answer waives all other answers in said cause, and said last amended answer is frivolous, in that it raises no material issue, nor does it tender any material one.

J. W. WHALLEY AND
NORTHUP & GILBERT,
Att'ys for Plaintiff.

Due acceptance and service of a certified copy of the foregoing motion is hereby acknowledged on this 13th day of Oct., 1884.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Attorneys for Defendant.

Endorsed: Filed Oct. 14, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

104½ And afterwards, to wit, on the 18th day of October, 1884, there was duly filed in said court an answer in words and figures as follows, to wit:

105 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

The defendant answers to the amended complaint:

That it denies that the plaintiff, pretending to be the Oregonian Railway Company, limited, was at any time or is a corporation created or existing under or by virtue of any act of Parliament of the United Kingdom of Great Britain and Ireland entitled "An act for the incorporation, registration, and winding up of trading companies and other associations," dated and passed August 7, 1862, and of the acts amendatory thereto, or that it was at any time an incorporation by virtue of any act of said Parliament, or is at all an incorporation.

That defendant admits that the several — in the amended complaint mentioned of that certain act of said Parliament therein referred to contain the provisions recited in said complaint, and that it alleges that there is no other or further provision of said act, or of any act of said Parliament or law of said Kingdom, relating to the powers of corporations created or existing under the laws of said Kingdom; that the provisions so recited comprise all the provisions of the laws of said Kingdom in respect to the powers or authority of corporations created or existing under the laws of said Kingdom;

that said laws do not confer upon the plaintiff any power or
106 authority to lease its said railroad property or franchises.

That defendant has no knowledge or information sufficient to form a belief as to whether the persons in the amended complaint mentioned or as to whether any persons at any time, in pursuance of any provisions of said Companies' Act or of any act of said parliament, or at all, made or entered into or executed any memorandum of association entitled "A memorandum of association of the Oregonian Railway Company, limited," or as to whether any memorandum of association was at all made, executed, or entered into at any time, in words or figures or effect as set forth in said amended complaint.

That defendant has no knowledge or information sufficient to form a belief as to whether the persons in the said amended complaint mentioned or as to whether any persons at any time, in pursuance of any provision of the said alleged —, or of any act of said Parliament, or at all, made or entered into or executed any articles of association or delivered any such articles to the registrar of joint stock companies as required by section 17 of said alleged act, or otherwise, or as to whether such registrar did at any time retain or register any memorandum or articles of association or certified the said Oregonian Railway Company, Limited, to be incorporated or to be limited, or as to whether any articles of association were at any time made, executed, or entered into in words or figures or effect as set forth in said amended complaint, or as to whether the pretended

memorandum or articles of association of the said defendant are as set forth in said amended complaint.

107 That defendant denies that plaintiff became or is vested with the rights, powers, privileges, or franchises to build, construct, reconstruct, divest, equip, own, operate, lease, sell, transfer, or dispose of, or purchase or otherwise acquire, hold, operate, use, work, or deal in any railway or railways, railroad or railroads, or branch or extension thereof, or telegraph or telephone lines, warehouse or warehouses, or building for receiving or storing grain or other produce in the States of Oregon, California or Nevada, or in the Territories of Washington or Idaho, or of carrying passengers or freight in either of said States or Territories; and that defendant has no knowledge or information sufficient to form a belief as to whether said plaintiff has any registered office at Dundee, in Scotland, or elsewhere, or transacts business in the State of Oregon, or has complied with the laws of said State for the regulation of foreign corporations doing business therein, or with the foreign laws as set out in said complaint, or with any foreign laws.

That defendant denies that plaintiff became or is an incorporated company, or had or has any of the rights, powers, privileges, or franchises mentioned in said alleged memorandum or articles of association, or is entitled or authorized to transact business in this State or elsewhere, or owns a railroad in said State.

That defendant admits that it is and was during the times in the complaint mentioned a corporation duly incorporated under the laws of the State of Oregon; but denies that it ever had or

108 has the power or right of franchise to purchase or lease any railroad in the State of Oregon.

That defendant denies that at any time plaintiff demised unto it the railroad or railway in the complaint mentioned, but alleges that about the first day of August, 1881, the president and assistant secretary of defendant signed the paper and writing relied upon by plaintiff as a lease; that neither plaintiff nor defendant was at any time empowered or authorized to execute such writing or to enter into any indenture of leasing; that the State of Oregon did not authorize or consent to such or any contract of leasing by plaintiff or taking in lease by defendant; that no special or other law has at any time been enacted by said State conferring such authority on either of the parties hereto; that the stockholders of defendant did not at any time authorize or assent to such or any contract of leasing, and the said pretended agreement was and is unauthorized and void.

That it is true defendant, upon the execution, as aforesaid, of said writing, entered into possession of said road, and so continued to the 15th of May, 1884, but defendant denies that since said time it has been or now is in possession thereof under or in pursuance of said writing or pretended lease, or otherwise than at the special request of plaintiff for its accommodation, and solely to prevent losses which might otherwise result to the plaintiff from discontinuing the operation of such road, and in accordance with the terms of the written memorandum of agreement between the defendant's president and

Edmund Robertson, as attorney-in-fact for plaintiff, which agreement is set forth in the complaint; that at all times since the
109 said tender of possession by defendant to plaintiff it has had, and now has, possession of said railroad property pretended to be demised solely in pursuance of the said agreement of May 15, 1884.

That defendant denies that any sum of money whatever is unpaid or due plaintiff from defendant; and it alleges that it has fully paid the rental provided for in said pretended lease for the term during which it had possession of said railroad and railroad property under the same, being for the term ending May 15, 1884.

That defendant denies that at the time of tendering and offering to restore said property the same was not in equally good condition, as to repair, equipment, or value, as when received by plaintiff.

Wherefore defendant prays judgment against plaintiff for its costs and disbursements herein.

J. N. DOLPH AND DOLPH,
BELLINGER, MALLORY & SIMON,
Attorneys for Def't.

UNITED STATES OF AMERICA, *District of Oregon:*

I, Theodore Wygant, being duly sworn, say that I am secretary of the defendant, and that I believe the foregoing amended answer to be true.

THEODORE WYGANT.

Subscribed and sworn to before me this 17th day of October, A. D. 1884.

[SEAL.] J. SILVERSTONE,
Notary Public in and for Oregon.

DISTICT OF OREGON, *ss:*

Service of the within amended answer in the above-entitled cause upon me as one of the plaintiff's attorneys within this district
110 is hereby acknowledged this 18th day of October, 1884.

W. B. GILBERT,
Of Attorneys for Pl'ff.

(Endorsed:) Fled Oct. 18, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

110½ And afterwards, to wit, on the 24th day of October, 1884, there was duly filed in said court a motion in words and figures as follows, to wit:

111 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY & NAVIGATION COMPANY, Defendant.

And now comes the plaintiff herein, by its attorneys, and moves

the above-entitled court to strike out the amended answer of the defendant last filed in this cause, and thereupon to grant judgment in favor of plaintiff as prayed for in the amended complaint herein, for the reason that said last amended — is frivolous and immaterial.

H. H. NORTHROP, W. B. GILBERT &
J. W. WHALLEY,
Attorneys for Plaintiff.

Due service of the foregoing motion is hereby admitted to have been made on the undersigned by the delivery of a true copy thereof to them at Portland, Multnomah county, Oregon, this 24th day of October, 1884.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Att'ys for Def't.

Endorsed: Filed Oct. 24, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

111½ And afterwards, to wit, on the 24th day of October, 1884, there was duly filed in said court a notice in words and figures as follows, to wit:

112 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,

vs.

THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

To Messrs. Dolph, Bellinger, Mallory, and Simon:

GENTLEMEN: You will please take notice that on Wednesday, the 29th day of October, 1884, at the hour of ten o'clock a. m. of said day, or as soon thereafter as application can be heard, the above-named plaintiff will, by the undersigned, its attorneys, apply to the above-entitled court to appoint a day certain in which it will hear argument on the motion to strike out the answer of the above-named defendant in the above-entitled suit, thereupon to grant judgment upon the ground that it is frivolous, now on file in the office of the clerk of said court.

Respectfully,

J. W. WHALLEY,
Of Counsel for Plaintiff.

Due service of the foregoing notice is hereby admitted to have been made on the undersigned by a delivery of a true copy thereof to them at Portland, Multnomah county, Oregon, this 24th day of October, 1884

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Att'ys for Def't.

(Endorsed:) Filed Oct. 24, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

112½ And afterwards, to wit, on the 7th day of November, 1884, there was duly filed in said court a notice in words and figures as follows, to wit:

113 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

To the Oregonian R'y Co., Lt., defendant above named, and to Mess. Whalley, Northup & Deady and W. B. Gilbert, its attorneys:

You will please take notice that on Monday, the 10th day of November, 1884, upon the coming in of the court, defendant will move for leave to amend its answer to the amended complaint herein, filed on the 18th day of October, 1884; that the amendments proposed and incorporated in the engrossed copy of amended answer proposed to be filed *and* herewith served.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Att'ys for Def't.

Due service of the written notice for leave to amend is hereby accepted within Multnomah county, State of Oregon, this the 7th day of November, 1884.

J. W. WHALLEY,
Of Att'ys for Pl'ff.

Endorsed: Filed Nov. 7, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

113½ And afterwards, to wit, on Monday, the 1st day of December, 1884, the same being the 26th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

114 THE OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

DECEMBER 1, 1884.

This cause having heretofore been heard upon the motion of plaintiff to strike out the second amended answer to the amended complaint herein as frivolous, and for judgment, and upon the motion of the defendant for leave to file its third amended answer to the said amended complaint, and argued by Mr. John W. Whalley, of counsel for plaintiff, and by Mr. Charles B. Bellinger, of counsel for defendant, and taken under advisement by the court, and now

the court being fully advised in the premises, it is ordered that the said motion to strike out and for judgment be, and the same is hereby, denied, and that the said motion for leave to file a third amended answer be, and the same is hereby allowed; which said answer is now filed.

114¼ And afterwards, to wit, on the 1st day of December, 1884, there was filed in said court an answer in words and figures as follows, to wit:

115 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,

vs.

THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

The defendant answers to the amended complaint:

That it denies that the plaintiff, pretending to be the Oregonian Railway Company, limited, was at any time or is a corporation created or existing under or by virtue of an act of Parliament of the United Kingdom of Great Britain and Ireland, entitled an act for the incorporation, regulation, and winding up of trading companies and other associations, dated and passed August 7, 1862, and of the acts amendatory thereof, or that it was an incorporation, at any time, by virtue of any act of said Parliament, or is at all an incorporation.

That defendant admits that the several sections in the amended complaint mentioned of that certain act of said Parliament therein referred to contain the provisions recited in said complaint, and that it alleges that there is no other or further provisions of said act, or of any act of the said Parliament or law of said Kingdom, relating to the powers of corporations created or existing under the laws of said Kingdom; that the provisions so recited comprise all of the provisions of the laws of said Kingdom in respect to the powers of

116 authority of corporations created or existing under the laws of said Kingdom; that said laws do not confer upon the plaintiff any power or authority to lease its said railroad, property, or franchise.

That defendant has no knowledge or information sufficient to form a belief as to whether the persons in the amended complaint mentioned or as to whether any persons at any time in pursuance of any provisions of said companies' act, or of any act of said Parliament, or at all, made or entered into or executed any memorandum of association, entitled "A memorandum of association of the Oregon Railway Company, Limited," or as to whether any memorandum of association was at all made, executed, or entered into at any time in words or figures or effect as set forth in said amended complaint.

That defendant has no knowledge or information sufficient to form a belief as to whether the persons in said amended complaint mentioned, or as to whether any persons at any time in pursuance of any provisions of the said alleged or of any act of the said Par-

liament, or at all, made or entered into or executed any articles of association, or delivered any such articles to the registrar of joint stock companies, as required by section 17 of said alleged act, or otherwise, or as to whether such registrar did at any time retain or register any memorandum or articles of association or certified the said Oregonian Railway Company, Limited, to be incorporated or to be limited, or as to whether any articles of association were at any time made, executed, or entered into in words or figures or effect, as set forth in said amended complaint, or as to whether the pretended memorandum or articles of association of said defendant are
117 as set forth in said amended complaint.

That defendant denies that plaintiff became or is vested with the rights, powers, privileges, or franchises to build, construct, reconstruct, divert, equip, own, operate, lease, sell, transfer, or dispose of, or purchase or otherwise acquire, hold, operate, use, work, or deal in any railway or railways, railroad or railroads, or branch or extension thereof, or telegraph or telephone lines, warehouse or warehouses, or building for receiving or storing grain or other produce in the States of Oregon, California, or Nevada, or in the Territories of Washington or Idaho, or of carrying passengers or freight in either of said States or Territories; and that the defendant has no knowledge or information sufficient to form a belief as to whether said plaintiff has a registered office at Dundee, in Scotland, or elsewhere, or transacts business in the State of Oregon, or has complied with the laws of said State for the regulation of foreign corporations doing business therein or with the foreign laws as set out in said complaint or with any foreign laws.

That defendant denies that plaintiff became or is an incorporated company or had or has any of the rights, powers, privileges or franchises mentioned in said alleged memorandum of articles of association, or is entitled or authorized to transact business in this State or elsewhere, or owns a railroad in said States.

That defendant admits that it is and was during the times in the complaint mentioned a corporation duly incorporated under the laws of the State of Oregon, but denies that it ever had or has the
118 power or right or franchise to purchase or lease any railroad in the State of Oregon.

That defendant denies that at any time plaintiff demised unto it the railway or railroads in the complaint mentioned, but alleges that about the first day of August 1881, the president and assistant secretary of defendant signed the papers and writing relied upon by plaintiff as a lease, and affixed thereto defendant's corporate seal; that neither of such officers of defendant had authority to execute on behalf of defendant such writing or indenture of lease.

That neither plaintiff nor defendant was at any time empowered or authorized to execute such writing or to enter into any indenture of leasing; that the State of Oregon did not authorize or consent to such or any contract of leasing by plaintiff or taking in lease by defendant; that no special or other law has at any time been enacted by said State conferring such authority upon either of the parties hereto, or purporting so to do or relating thereto; that the stock-

holders of defendant did not at any time authorize or assent to such or any contract of leasing, and the said pretended agreement was and is unauthorized and void.

That it is true that defendant, upon the execution, as aforesaid, of said writing, entered into possession of said road and so continued to the 15th day of May, 1884, but defendant denies that since said time it has been or now is in possession thereof under or in pursuance of said writing or pretended — or otherwise than at the special request of plaintiff for its accommodation, and solely to prevent loss which might otherwise result to plaintiff from discontinuing the operation of such road, and in accordance with the terms
119 of the written memorandum of agreement between the defendant president and Edmund Robertson, as attorney-in-fact for plaintiff, which agreement is set forth in the complaint; that at all times since the said tender of possession by defendant to plaintiff it has had, and now has, possession of said railroad property pretended to be demised solely in pursuance of the said agreement of May 15th, 1884.

That defendant denies that any sum of money whatever is unpaid or due plaintiff from defendant; and it alleges that it has fully paid the rental provided for in said pretended lease for the term during which it had possession of said railroad and railroad property under the same, being for the term ending May 15, 1884.

That the defendant denies that at the time of tendering and offering to restore said property the same was not in equally good condition as to repair, equipment, or value as when received by plaintiff.

For a further and separate defence herein defendant alleges:

First. That the railroad or railroads which the defendant was and is organized to construct and operate, and the termini of which were specified in its articles of association, ran east from the city of Portland, in the State of Oregon, and between points and places in the eastern part of said State, and did not embrace the railroad mentioned and purporting to be demised in said lease, nor any railroad running south from said city of Portland, or between points or places south of said city, and that the said railroad men-
120 tion in said lease, and purporting to be demised thereby, is a wholly different road, forming no part of and having no near connection with or relation to the road or system of roads the termini of which are mentioned in any of the articles of association of said O. R. & N. Company, defendant herein.

Second. That prior to the execution of the pretended indenture of lease the whole of the capital of the defendant had been contributed and applied in the construction and equipment of a railroad or railroads, the termini of which were specified in the articles of association, and which were wholly different from and independent of the railroad mentioned in said pretended lease and purporting to be demised thereby, and had no near connection with or relation to the railroad last above mentioned, and that the said pretended indenture of lease has never, in any manner, been authorized or assented to by the stockholders of the defendant, and that the act of

defendant's officers, in seeking to bind defendant to said pretended indenture of lease, was a wholly unauthorized attempt to divert and subject the capital of defendant, contributed as above mentioned, to a wholly new object and enterprise not contemplated when said capital was contributed and expended.

Wherefore defendant prays judgment against plaintiff for its costs and disbursements herein.

J. N. DOLPH AND
DOLPH, BELLINGER,
MALLORY, AND SIMON,
Att'ys for Def't.

STATE OF OREGON, *County of Multnomah:*

120½ I, Theodore Wygant, being first duly sworn, say I am the secretary of the defendant above named, and that I believe the foregoing answer to be true.

THEODORE WYGANT.

Subscribed and sworn to before me this 11th day of November, A. D. 1885.

[SEAL.] J. SILVESTONE,
Notary Public in and for Oregon.

We hereby acknowledge service of a copy of the foregoing answer upon us at Portland, Oregon, this 11th day of November, 1884.

_____ _____.

(Endorsed:) Filed Dec. 1, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

120¾ And afterwards, to wit, on the 1st day of December, 1884, there was duly filed in said court an opinion in words and figures as follows, to wit:

121 *Action to Recover Rent.*

U. S. Circuit Court, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited,
v.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

MONDAY, *December* 1, 1884.

(1) *Denial of Knowledge or Information.*—A defendant is not bound to inform himself concerning the truth of an allegation, of which he never had any knowledge, before answering the same; and a denial of any knowledge or information thereof is a sufficient denial, and will not be stricken out as sham unless it plainly appears that the same is false.

(2) *Frivolous Pleading.*—A frivolous answer or defense is one which contains nothing that affects the plaintiff's case and may be stricken out on motion; but a motion to strike out for frivolousness is not well taken if the matter included in it is material, if true.

(3) *Plea in Bar or Abatement.*—In an action by a corporation on a contract, a denial of its corporate existence goes not only to the disability of the plaintiff, but to the cause of action also, and is therefore a plea or defense in bar of the action, and will be so considered, unless expressly pleaded in abatement.

(4) *Estoppel by Contract.*—A party who contracts with a corportion, as such, is thereby estopped, in an action on such contract, to deny its corporate existence or power to make such contract; but in case such want of existence or power is pleaded as a defense to such action the corporation must claim the benefit of the estoppel on the record, or the same will be considered waived.

(5) *Pleading an Estoppel.*—When the matter constituting the estoppel—the compact—does not appear in the previous pleadings, it must be set up by replication; but where the same does so appear, the estoppel must be raised by demurrer.

DEADY, J.:

This action is brought by the Oregonian Railway Company, limited, a foreign corporation alleged to have been formed in Great Britain under "the companies act of 1862," against the Oregon Railway and Navigation Company, a domestic corporation formed under the general incorporation act of Oregon of 1862, to recover the sum of $68,131, alleged to be due the plaintiff for the use of its railway in Oregon, commonly called the "narrow-gauge" road, for the half year beginning May 15, 1884.

It is alleged in the amended complaint filed August 15, 1884, that the plaintiff became a corporation on April 30, 1880, by certain persons making and delivering for registry under the British act aforesaid a "memorandum of association" and "articles of association," as therein set forth; that the defendant became a corporation under the Oregon act aforesaid on June 13, 1879, by certain persons making and filing articles of incorporation to that effect, as therein set forth; that on August 1, 1881, the plaintiff was the owner of a certain railway in Oregon, and then demised the same by a written instrument to the defendant for the term of 96 years for and upon a yearly rental of 28,000 pounds sterling, to be paid in half-yearly installments, in advance, and that the defendant, by its proper officers, duly executed said instrument, they being first thereunto fully authorized by a vote of its directors, and that the defendant thereupon entered into possession of the railway and operated the same, but has failed to pay the installment of rent falling due on May 15, 1884.

By the second amended answer to this amended complaint, filed October 18, 1884, the defendant expressly admits that it is a corporation formed under the laws of Oregon, and that its president and assistant secretary signed the written instrument aforesaid, and that in pursuance thereof it entered into the possession of said railway, and operated the same until May 15, 1884, when it offered to return the same to the plaintiff, which offer was declined, and that it has since retained the possession thereof only under a special agreement with the plaintiff not material to the present inquiry, and denies (1)

that the plaintiff is or ever was a corporation under the companies act of 1862 or otherwise, or at all; (2) that the law of Great Britain confers on the plaintiff the power to lease said railway; (3) knowledge or information sufficient to form a belief as to whether a memorandum or articles of association were made and delivered for registry, as alleged in the complaint, or at all; (4) that plaintiff is or ever was authorized to construct, own, operate, lease, or sell a railway in Oregon, or that it has ever complied with the laws of Oregon on the subject of foreign corporations doing business therein; (5) that either the plaintiff or defendant ever had authority to execute said written instrument or any indenture for the leasing of said railway, or that the plaintiff ever demised the same to the defendant, and (6) that any sum of money is due the plaintiff from the defendant, and avers that it has fully paid the rental provided for in said pretended lease for the period during which it was in possession of said railway, to wit, for the period ending May 15, 1884.

The plaintiff moves to strike out this answer as being "frivolous and immaterial;" and for judgment.

In the brief submitted by counsel in support of this motion it is maintained that the denials of knowledge or information concerning the alleged execution and delivery of the memorandum and articles of association are insufficient, because they relate to matters which are of record, and of which the defendant can inform itself, or to such things as are presumtively already within its knowledge, and therefore it is not at liberty to convert the allegation otherwise than by a positive denial, citing Heatherly *v.* Hadley, 2 Or., 275; State *v.* McGarry, 31 Wis., 500; Hance *v.* Rumming, 2 E. D. Smith, 48; Curtis *v.* Richards, 9 Cal., 38; Nelson *v.* Murray, 23 Cal., 338; Pom. on Rem., §641; Moaks *v.* S. Plead., §517. But none of these authorities go so far as to hold that because the subject of an allegation in a pleading is of record *that* therefore the party answering or replying thereto must take the trouble to inform himself so as to be able to deny the allegation positively, if at all.

A party may, by the force of a statute, have constructive notice or knowledge of the existence and contents of a private writing duly admitted to record in a public registry, but there is no presumption that he has any actual knowledge or information on the subject unless it also appears that he had some connection with the transaction contained in the record or relation to the proceeding out of which it grew. The rule was long ago stated by Mr. Justice Field, in Curtis *v.* Richards, *supra*, as follows: "If the facts alleged are presumtively within the knowledge of the defendant, he must deny positively, and a denial of information or belief will be treated as an evasion. Thus, for example, in reference to instruments in writing alleged to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description, or of the copies in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals. If the facts alleged are not such as must be within the personal knowledge of the defendant, he may

answer according to his information and belief;" or rather he may deny knowledge or information thereof sufficient to form a belief. See, also, on this point Pom. on Rem., §641, wherein it is said, in effect, that a party may controvert an allegation by a denial of any knowledge or information thereof, whenever such denial would not, in the light of the circumstances, appear to be palpably false.

Now, upon the facts stated in this case there can be no presumption that the defendant has any personal knowledge concerning the existence or contents of the documents made and registered in Great Britain by means of which the plaintiff claims to have become a corporation. How can such presumption arise? The defendant was an utter stranger to the proceeding, and there is no evidence that it or those who represent it, and through whom its knowledge must come, ever saw or examined the documents for any purpose.

Neither is a party under any obligation to inform himself concerning any matter of fact so that he may answer an allegation relating to it positively, unless it be to recall and verify that knowledge or information of the matter which he once had and is still presumed to have, but which may have become dim or confused in his mind by reason of the lapse of time or other circumstance.

And if such a denial is improperly made it may be stricken out as sham, manifestly false in fact. But it is not for that reason either "frivolous" or "immaterial." That depends wholly on the character of the allegation denied. If that is material, the denial of all knowledge or information concerning it is also material.

Another ground of this motion, as set forth in the brief, is that the denial of the plaintiff's corporate existence is a plea in abatement, and, being pleaded with a defence to the merits, it is to be considered as waived and abandoned, citing rule 40 of this court, Hopwood *vs.* Patterson, 2 Or., 49; Or. Cen. R'y Co. *vs.* Wait, 3 Or., 91.

And first, it is not absolutely necessary to strike out of an answer matter in abatement which has been waived by a subsequent defense, in the same answer or otherwise, to the merits. Being waived by such subsequent pleading, it is impliedly out of the case. But it may be convenient, particularly in a doubtful case, to move to strike out before going to trial, so as to ascertain and determine the material issues in the case. But such motion, if it includes the whole answer, as in this case, must fail, and should, in my judgment, be made on the ground that the matter being waived, has become redundant or irrelevant.

122 There is no doubt that the rule and authorities on the subject of pleading matter in abatement with matter to the merits is as stated by counsel for plaintiff.

But are these denials of the plaintiff's corporatate existence generally, or of particular facts necessary thereto, or of its power to make the contract in question, pleas in abatement, or in bar of the action? These denials are equivalent to an allegation that the plaintiff is not only without power to make this contract, but is really a fictitious person. A plea that the plaintiff is a fictitious person is sometimes classed by the text writers as a plea in abatement. 1 Chit., p.

482; Gould, p. —, ch. v, § 38. But the latter in § 60 of the same chapter says: "That the plaintiff never was *in esse* seems also to be a good plea in bar. For that a right of action should exist in favor of an imaginary person is plainly impossible."

This is not a case where an admitted cause of action is being prosecuted in the name of a fictitious person like Doe *v.* Penfield, 16 John, 308. In that case the fact that the plaintiff was a fictitious person was pleaded in abatement of the action, while the cause of action or indebtedness of the defendant to the real party in interest was not controverted. But this is a case in which the cause of action—the liability of the defendant—is bound up in and dependent upon the legal existence of the alleged plaintiff, and a denial or defense which puts that fact in issue is to all intents and purposes a plea in bar, and unless expressly pleaded in abatement merely should be so considered.

It is also contended by counsel for the plaintiff that the defendant having contracted with the plaintiff as a corporation existing under the laws of Great Britain by the corporate name of "The Oregonian Railway Company, limited," for the lease of its railway, is not now permitted to deny such corporate existence or the power to make such contract.

The law is well settled that a person who contracts with an apparent corporation as such is estopped when sued on such contract to say that the plaintiff had no corporate exisitence or power to make such contract. A corporation, like an individual, when sued on a contract may set up as a defense its want of power or capacity to make such contract; but the party with whom it contracts cannot set up such want of power or capacity as a defense to an action by the corporation for a breach thereof. And the reason of the distinction is that legal disability, as in the case of a minor, is a defense personal to the party who is under it, and cannot be taken advantage of by another. Cowell *v.* Springs Co., 100 U. S., 61; Bigelow on Estoppel (3 Ed.), 464–5. But notwithstanding this the defense of a want of corporate existence or power, if made, is not a "frivolous" one. A defense is only "frivolous" when it contains nothing that can affect the plaintiff's case. Witherell *v.* Wiberg, 4 Saw., 233. But these denials, unless the plaintiff sets up and claims the benefit of the estoppel whenever the opportunity occurs, are a good defense to the action. They are material, and if the plaintiff waives the estoppel and goes to trial on the issue arising thereon and fails to prove its corporate existence and power, the verdict and judgment must go against it.

The matter which may estop the defendant in this case from denying the corporate existence of the plaintiff is the fact of its contracting with the latter as such corporation. If this fact did not already appear in the complaint the plaintiff could not have the benefit of the estoppel, unless he set it up in a replication; and that is the way in which the point is generally made in the pleadings. But in this case the matter which operates as an estoppel—the contract of leasing—is set forth in the complaint. In such case the defendant may claim the benefit of the estoppel by a demurrer to the

plea, which contains the defense of a want of corporate existence or power. 1 Chit., p. 634; Bigelow on Estoppel (3 Ed.), 591.

I have not seen a precedent of such a demurrer, but the form may be readily devised from the usual replication of an estoppel to a plea.

The demurrer should not be general—that the facts contained in the plea do not constitute a defense to the action—but special and to the effect that the defendant ought not to be heard or allowed to say or allege that the plaintiff is not a corporation or has no power to make the contract sued on, contrary to its own acknowledgement and deed, as appears by the complaint and is admitted by the answer.

The first, second, third, and part of the fourth and fifth of these denials are intended to and do controvert the corporate existence and power of the plaintiff, and cannot therefore be considered frivolous; and the same may be said of the denial of the defendant's power to enter into this contract. But the question of the plaintiff's corporate existence or the power of it or the defendant to execute the lease should more properly be made by demurrer to the complaint.

The denial of indebtedness is clearly frivolous; for, taken as a whole, it only amounts to an averment that all the prior installments of rent have been paid. So of the denial that the plaintiff has complied with the laws of the State on the subject of foreign corporations. The act requiring certain foreign corporations to comply with certain provisions thereof before doing business in the State has no application to railway corporations, and is confined in its operation to the corporations mentioned in the title thereof. Or. & W. T. & I. Co. *v.* Rathbun, 5 Saw., 32.

But the motion to strike out on the ground of frivolousness being taken to the whole answer cannot be allowed in part, and is therefore disallowed altogether.

The defendant also moves for leave to file a third amended answer containing the same matter as the one under consideration with two additional affirmative defences. Without considering its materiality, I think proper to allow it to be filed, and thus give the plaintiff an opportunity to meet the defences attempted to be made by it, in the light of this decision and as it may now be advised.

Mr. John W. Whalley and Mr. William Gilbert, for the plaintiff.

Mr. Charles B. Bellinger, for the defendant.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed Dec. 1st, 1884.

R. H. LAMSON, *Clerk*,
By G. G. GAMMANS, *Deputy*.

122½ And afterwards, to wit, on the 5th day of December, 1884, there was duly filed in said court a demurrer in words and figures as follows, to wit:

123 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

And now comes the said plaintiff, by its attorneys, and demurs to so much of the last amended answer herein as pleads to or denies the corporate existence, due organization of plaintiff as a corporation, or facts relating to the organization of plaintiff as a corporation, or which pleads to or questions or denies compliance by plaintiff with foreign or domestic law, or which attempts to deny the demise alleged in the amended complaint by plaintiff to defendant, and also to so much of said last amended answer as pleads to or denies, or attempts to plead to or deny, or questions the powers, rights, privileges, franchises, or ownership of plaintiff alleged in the amended complaint herein, for the reason that the said defendant ought not to be allowed, or heard to say or allege, that the plaintiff is not a corporation, or has no power to make the contract herein sued on, or to make any denials contrary to defendant's own acknowledgment and deed of about August 1st, 1884, as appears by the said amended complaint herein and admitted by the last amended answer filed in this cause.

2nd. And plaintiff also demurs to so much of said last amended answer as by plea attempts to set up want of power and authority in defendant corporation and its affairs to enter into the contract alleged in the amended complant and, for cause of demurrer thereto, says that upon the face of the matter alleged in said plea it appears
124 that the same does not constitute a defence or counter-claim to said action.

3rd. And plaintiff demurs to all the supposed answer and defence following the words in said last amended answer: "For a further and separate defence herein defendant alleges," for the reason that the new matter therein set up does not constitute a defence or counter-claim to this action.

W. B. GILBERT, AND WHALLEY,
NORTHUP, & DEADY,
Attorneys for Plaintiff.

STATE OF OREGON, }
Multnomah County, } *ss:*

Service of a copy of the foregoing demurrer upon us is hereby acknowledged at Portland, in said district, this the 5th day of December, A. D. 1884, and all other service is hereby waived.

DOLPH, BELLINGER,
MALLORY, & SIMON,
Attorneys for the Defendant, the Oregon Railway and Navigation Company.
By W. T. HUME.

(Endorsed:) Filed Dec. 5, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

124½ And afterwards, to wit, on the 5th day of December, 1884, there was duly filed in said court a motion in words and figures as follows, to wit:

125 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant.

And now comes the said plaintiff, by its attorneys, and moves the court to strike out all that part of the last amended answer herein filed commencing with the words: "That it is true that defendant upon the execution" down to and inclusive of the words "the said agreement of May 15th, 1884," for the reason that each and every allegation and denial therein contained is immaterial and irrelevant, and the whole thereof frivolous.

And plaintiff further moves the court to strike out of said last amended answer all that part thereof following the words "said agreement of May 15th, 1884," down to and inclusive of the words "as when received by plaintiff," for the reason that the same is wholly frivolous, immaterial, and irrelevant.

And plaintiff further moves to strike out the following part of the said last amended answer commencing — words on the 6th page thereof, "that defendant admits that it is" down to and inclusive of the words "in the State of Oregon," for the reason the matter of admission is irrelevant, and the rest thereof sham and frivolous.

And plaintiff further moves the court to strike out the rest and residue of said last amended answer which is not in this section demurred to, and which is not hereinbefore moved to be stricken out, for the reason that such residue is wholly immaterial and irrelevant to the issues in this cause.

W. B. GILBERT & WHALLEY,
NORTHUP & DEADY,
Attorneys for Plaintiff.

126 STATE OF OREGON, } *ss:*
Multnomah County, }

Service of the foregoing motion to strike out, by a copy, admitted upon us at Portland, in said district, this the 5th day of December, A. D. 1884, and all other service is hereby expressly waived.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Attorneys for the Defendant, the Oregon R'y & Navigation Co.,
By W. T. HUME.

(Endorsed:) Filed Dec. 5, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

126½ And afterwards, to wit, on the 5th day of December, 1884, there was duly filed in said court a notice in words and figures as follows, to wit:

127 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. —.

To the above-named defendant, and to Messrs. Dolph, Bellinger, Mallory, and Simon, its attorneys:

Take notice that on Wednesday, the 10th day of December, A. D. 1884, at the hour of ten o'clock a. m. of said day, or as soon thereafter as counsel can be heard, the plaintiff will, by its attorneys, at the court-room of the above-entitled court, in open court, move said court for an order setting down for hearing at a time certain the demurrers filed herein to the last-amended answer of defendant, and also the motion to strike out parts of said last-amended answer on file in this cause.

Respectfully yours,

W. B. GILBERT & WHALLEY,
NORTHUP & DEADY,
Attorneys for Plaintiff.

Due service of a true copy of the within notice is hereby admitted to have been made on us on this 5th December, A. D. 1885.

DOLPH, BELLINGER,
MALLORY, AND SIMON,
Att'ys for Defendant,
By W. T. HUME.

(Endorsed:) Filed December 5, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

127¼ And afterwards, to wit, on Wednesday, the 18th day of March, 1885, the same being the 82nd judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

127½ In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

MARCH 18, 1885.

This cause having heretofore been heard upon the demurrer to the amended answer filed herein December first, eighteen hundred and eighty-four, and upon the plaintiff's motion to strike out part of said answer, and argued by Mr. John W. Whalley and Mr. William B. Gilbert, of counsel for plaintiff, and by Mr. Cyrus A. Dolph and Mr. C. B. Bellinger, of counsel for defendant, and taken under

advisement by the court, and now, at this day, the court being fully advised in the premises, and it appearing that the matters in said answer included in said motion to strike out are redundant and irrelevant, and that the remaining denials and defenses in said answer, or any of them, are not sufficient to bar said plaintiff of its rights to recover in this action, it is considered that said motion be, and the same is hereby, allowed, and that said demurrer be, and the same is hereby, sustained; and that said plaintiff, The Oregonian Railway Company, Limited, have and recover from the said defendant, The Oregon Railway and Navigation Company, the sum of sixty-eight thousand one hundred and thirty-one dollars, with legal interest, to wit, eight per centum per annum, thereon since May fifteenth, 1884, in all the sum of seventy-two thousand seven hundred and fifteen dollars and forty-three cents, and its costs and disbursements herein, taxed at $599.17.

127¾ And afterwards, to wit, on the 18th day of March, 1885, there was duly filed in said court an opinion in words and figures as follows, to wit.

128 *Action on Covenant in Lease to Recover Rent.*

THE OREGONIAN RAILWAY COMPANY, Limited,
v.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. 1035.

WEDNESDAY, *March* 18, 1885.

(1) *Estoppel to Deny Corporate Existence of Power.*—A person contracting with an ostensible corporation to do an act not prohibited by law is estopped in an action by said corporation on said contract to deny the existence of the corporation or its power to enter into such contract.

(2) *In Abatement or Bar.*—The want of corporate existence may be pleaded in abatement or bar, but the want of capacity to sue in a particular case must be pleaded in abatement.

(3) *Foreign Railway Corporations.*—By the act of October 21, 1878 (S. L. 95), foreign railway corporations, for the purpose of constructing and operating railways in this State, are placed on the footing of domestic corporations.

(4) *The Oregonian Railway Company.*—By the act of October 22, 1880 (S. L. 56), this body was recognized as an existing corporation, lawfully engaged in the construction and operation of a railway in this State, from Portland to the head of the Wallamet valley, with power to dispose of the same by lease or otherwise.

(5) *Ultra Vires.*—In an action against a corporation on a contract made by it the corporation is not estopped to show that such contract was beyond its power to make.

(6) *Oregon Corporations, Power of.*—The Oregon corporation act of October 11, 1862 (Or. Laws, 524), authorizes three or more persons to form a corporation to engage "in any lawful enterprise, business, pursuit, or occupation," and this includes the power to buy and sell or lease a railway.

(7) *Estoppel—Executed Contract.*—The contract of a corporation, though invalid for want of power in the corporation to make it, may, if not illegal, be enforced against such corporation, where it has had the benefit of the consideration therefor; but a covenant to pay the rent reserved on a lease six months in advance is not such a case; the consideration for such a promise is the future use and occupation of the property and not the past one.

(8) *Power of Directors and Shareholders.*—The corporate powers of a corporation formed under the law of this State are vested in the directors, and the validity of their acts is not affected by the assent or dissent of the shareholders; and the powers of the latter are limited to the matters which concern the internal organization of the corporation.

(9) *Subscription to Capital Stock.*—A subscription to the capital stock of a corporation is thereby pledged to the use or maintenance of the purposes of its organization, as specified in its articles, and may be applied to such of them as the directors shall determine.

DEADY, J.:

This action is brought by the plaintiff, a corporation alleged to have been formed in Great Britain under the "companies act of 1862," against the defendant, a corporation formed under the Oregon corporation act of 1862, to recover the sum of $68,131, alleged to be due the plaintiff on a lease of its railway, in Oregon, commonly called the "Narrow Gauge" road, for the half year commencing May 15, 1884.

The case was before this court in December last, on a motion to strike out the second amended answer of the defendant, as "frivolous and immaterial," and for judgment on the complaint, which was denied for the reasons then given. 22 Fed. Rep., 245.

At the same time the defendant had leave to file a third amended answer, containing two additional defences.

It appears from the amended complaint, filed on August 15, 1884, that the plaintiff became a corporation on April 30, 1880, by certain persons making and delivering for registry, under the companies act aforesaid, a "Memorandum of Association" and "Articles of Association," as therein alleged and set forth, with a registered office at Dundee, in Scotland, and power, among other things, to own, purchase, construct, operate, lease, and sell any railway in Oregon; that the defendant became a corporation, under the Oregon act aforesaid, on June 13, 1879, by certain persons making and filing articles of incorporation, as therein alleged and set forth, with its principal place of business at Portland, in Oregon, and power, among other things, "to purchase or consolidate with or lease or operate and maintain, on such terms as may be agreed upon," any railway in Oregon; that on August 1, 1881, the plaintiff was the owner of a certain railway in Oregon, and then demised the same to the defendant, by an instrument in writing, for the term of 96 years, for and upon a yearly rent of 28,000 pounds sterling, which rent the defendant thereby expressly agreed to pay the plaintiff in half yearly installments in

advance, and that the defendant, by its proper officers, duly executed said instrument, they being first thereunto duly authorized by a vote of the directors, and that the defendant thereupon entered into the possession of said railway, and operated the same, but has failed and refused to pay the installment of rent falling due on May 15, 1884.

It is also stated in the complaint that on said last-mentioned date the defendant, pretending that neither party to said lease was authorized to execute the same, offered to restore the demised property to the plaintiff, but not in as good a condition as when received by the defendant, which offer the plaintiff refused to accept; and thereupon, to prevent the loss and injury that might result from suddenly discontinuing the operation of the road, it was agreed between the plaintiff and defendant that the latter should retain the possession thereof and continue to operate the same for a period of six months thereafter, during which time this action was commenced, to wit, on June 28; but neither such agreement nor the action of either party thereunder was to in any way prejudice its claim or contention as to the validity of said lease or affect its rights in the premises.

By the amended answer now filed, as well as the former one, the defendant admits that it is a corporation formed under the laws of Oregon, and that its president and assistant secretary signed the writing aforesaid and affixed thereto the corporate seal, in pursuance of a resolution of its directors, as alleged in the complaint; that in pursuance of said writing it entered into the possession of said railway and operated the same and paid the rent therefor, as therein provided, until May 15, 1884, when it offered to return the same to the plaintiff, which offer was declined, and that it has since retained the possession thereof only under a special agreement with the plaintiff, as above stated; that the said companies act of 1862 is correctly set forth in the amended complaint, and that it comprises all the law of Great Britain touching the power and authority of corporations created or existing under the laws thereof, and denies: (1) That the defendant is or ever was a corporation formed or existing under the companies act of 1862, or otherwise, or at all; (2) that neither said companies act nor any other law of Great Britain confers on the plaintiff the power to lease said railway; (3) knowledge or information sufficient to form a belief (*a*) as to whether a memorandum or articles of association were made and delivered for registry in pursuance of said companies act or at all, (*b*) or as to whether the plaintiff has a registered office at Dundee, in Scotland; (4) that the plaintiff is or ever was authorized to own, purchase, construct, operate, lease, or sell any railway in Oregon; (5) that either the plaintiff or defendant ever had the power or authority to execute said instrument in writing or any indenture for the leasing of said railway, or that the stockholders of the defendant ever authorized or assented thereto, and that said "pretended lease was and is unauthorized and void;" and that any sum of money is due the plaintiff from the defendant, and avers "that it has fully paid the rental provided for in said pretended lease" for the period during which it held possession of said railway thereunder, to wit, for the term ending May 14, 1884.

The further defenses contained in the answer are briefly these: (1) The railways which "the defendant was and is organized to construct and operate, and the termini of which were specified in its articles of association," are east of Portland, and do not embrace the railway alleged to have been demised to the defendant, nor any one to the south of said city, and that said railway forms no part of, and has no "near connection" with, the said roads of the defendant; (2) that prior to the execution of said pretended lease "the capital of the defendant had been contributed and applied in the construction and equipment" of railways, the termini of which are specified in its articles of association, and which have "no near connection" with the one mentioned in said lease; and that said lease was never authorized or assented to by the stockholders of the defendant, and was a wholly unauthorized attempt by the officers thereof "to divert and subject the capital of defendant to a wholly new object and enterprise not contemplated when said capital was contributed and expended."

The plaintiff demurs to this answer: (1) To so much thereof as denies the corporate existence or due organization of the plaintiff, or its power to make the contract herein sued on, for that the defendant ought not to be allowed or heard to say or allege the same contrary to its deed of August 1, 1881, as aforesaid; (2) to so much thereof as denies the power and authority of the defendant to make said contract, for that the same does not constitute a defense; and (3) to the first and second special defenses therein, for that "the new matter therein set up" does not constitute a defense.

The plaintiff also moves to strike out certain portions of
129 the answer as follows: (1) The admission that the defendant is and was a corporation under the laws of Oregon, coupled with the denial that it ever had the power to purchase or lease a railway in Oregon, because the admission is redundant and the denial sham and frivolous; (2) the admission that the defendant entered into possession of the railway under the alleged lease, coupled with the denial that the possession has been held thereunder since May 15, 1884; (3) The denial that at the time the defendant offered to restore the road to the plaintiff it was not in as good condition as when received by the defendant, because the same are frivolous and irrelevant; and (4) "The rest and residue" thereof not hereinbefore asked to be stricken out or included in the demurrer thereto, because the same is irrelevant.

The demurrer and motion were argued by counsel and submitted together.

This is substantially an action on the covenant of the defendant contained in the lease to pay the rent therein reserved, and its liability thereon does not depend on its use or occupation of the property. Mills *v.* Auriol, 1 Smith's L. C., 437. Therefore the allegations in the pleadings concerning the special agreement under which the defendant has operated the road since May 15, 1884, are immaterial and not relevant to the controversy involved in the action. And the same may be said of the allegations concerning the plaintiff's compliance with the laws of this state concerning

foreign corporations doing business herein, as there are no laws on the subject applicable to the plaintiff. Or. & Wash. T. & I. Co. *v.* Rathbun, 5 Saw., 32.

When the case was before the court, on the motion to strike out the answer, counsel for the plaintiff made the point that the denial of the plaintiff's corporate existence was a plea in abatement, and therefore waived by being pleaded with matter to the merits, but the court, admitting the rule, held that the matter was pleaded in bar, as it might be, and refused to strike it out. 22 Fed. Rep., 248. In the brief now filed in the case counsel returns to the argument, and insists that this denial of the corporate existence is a plea in abatement, citing Conrad *v.* Atlantic Ins. Co., 1 Pet., 750, where it is said that a plea to the merits admits the capacity of the plaintiff to sue, and that a want of corporate capacity should be taken advantage of by a plea in abatement. But the capacity of the plaintiff to sue is not all that is involved in a denial of its corporate existence.

In Society, etc., *v.* Pawlet, 4 Pet., 501, the court, in considering the question whether the plaintiffs had a right to hold land and therefore to maintain an action for the possession thereof, says: "No plea in abatement has been filed denying the capacity of the plaintiff to sue, and no special plea in abatement or bar that there is no such corporation as stated in the writ. * * * If the defendant meant to have insisted on the want of coporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar."

A corporation may exist for many purposes and yet not have capacity to sue in a particular case, and a plea in abatement is the proper mode of taking advantage of that fact; but the defense of a want of corporate existence goes further, and may be pleaded either in abatement or bar. But the latter is the most effective, and unless the matter is specially pleaded, as in abatement, it will be considered in bar or to the merits.

The demurrer to the answer raises three questions: (1). Is the defendant estopped to deny the corporate existence and due organization of the plaintiff or its power to enter into the contract sued on? (2). Was the defendant authorized to enter into this contract? And (3). Is the new matter contained in the two special defenses or either of them a bar to the action?

For the plaintiff it is contended that the first two of these questions must be answered in the affirmative and the last one in the negative. The argument is that the defendant, having contracted with the plaintiff as a corporation existing under the laws of Great Britain by the corporate name of "The Oregonian Railway Company, Limited," for the lease of its railway, is now estopped to deny such corporate existence, or the power to make the contract in question.

When this case was under consideration before it was said by the court (22 Fed. Rep., 249): "The law is well settled that a person who contracts with an apparent corporation as such is estopped, when sued on such contract, to say that the plaintiff had no corporate ex-

istence or power to make such contract. A corporation, like an individual, when sued on a contract, may set up as a defense to the action its want of power or capacity to make such contract, but the party with whom it contracts cannot set up such want of power or capacity as a defense to an action by the corporation for a breach thereof. And the reason of the distinction is that legal disability, as in the case of a minor, is a defense personal to the party who is under it, and cannot be taken advantage of by another." Citing Cowell *v.* Springs Co., 100 U. S., 61; Bigelow on Estop (3 ed.), 464–5.

But the counsel for the defendant now question the soundness of the rule laid down in Bigelow, supra—that legal disability can only be availed of by the party who labors under it, and cites Bank of Michigan *v.* Niles, Walker Chane (Mich.), 99; Ogdensburg & Co. *v.* Vermont & Co., 6 N. Y., S. C., 488, and Middlesex R'y Co. *v.* Boston & Co., 115 Mass., 347, to the contrary. The first case is not produced, but only a citation from it, in Morawetz on Corporations, where it is cited (§ 87) in support of the proposition—"A corporation cannot be compelled by legal process to do an act unauthorized by its charter," which is a very different thing from the purpose for which it is cited here. The case appears to have been a suit for specific performance of a contract for the sale of real property, which was probably not merely void as being *ultra vires* the plaintiff corporation, but actually illegal because prohibited by its charter.

The second is not in point, for the plaintiff corporation brought the suit to determine the validity of its lease to the defendant, and invoked the judgment of the court thereon. The demurrer to the complaint was sustained at the special term of the supreme court, and the decision of the court at the general term, which is cited, is only to the effect that the plaintiff had not ratified the lease by accepting rent thereon pending the appeal from the order sustaining the demurrer to its complaint; and for the very good reason that if the lease was *ultra vires*, because the corporation had no power to make it, it could not be ratified. And the last case is wider still of the mark. A horse railway was leased by a corporation and an action was brought by the assignee of the lessee against the lessor for money for repairs, claiming that by the terms of the lease the latter was bound for one-half of such expense. The defendant corporation set up the invalidity of the lease, because of its want of power to make it, and the court sustained the objection and gave judgment accordingly.

Two cases decided in this court—*In re* Comstock, 3 Saw., 218, and Semple *v.* The Bank, 5 Saw., 88—are also cited, to show that the legal disability of a corporation to make a contract may be set up as a defense in bar of an action thereon by such corporation. But the act or contract of the foreign corporation, the validity of which was contested in these cases, was not only unauthorized in this State, but was absolutely prohibited therein and therefore illegal, and this without any reference to the power or capacity of the corporation in the country of its formation and domicile. The same may be said of the cases, Rochester Ins. Co. *v.* Martin, 13 Minn., 59; Farmers,

etc., Bank *v.* Baldwin, 23 *id.*, 198, and Bank *v.* Pierson, 24 *id.*, 140, cited by counsel for the defendant for the same purpose.

When it appears that the existence of a corporation or the exercise of a particular power by it is prohibited by statute or the common law, in my judgment any one who has entered into a contract with such corporation may plead the fact of the prohibition to exist or make the contract in question as a defense to an action thereon. In such case the contract is not only unauthorized, but is illegal and contrary to public policy. As was said by this court in re Comstock, 5 Saw., 93, "No one is estopped to show that an act upon which a party claims a right is illegal simply because he was a party to it, even *in pari delicto*. If the matter concerned the parties to the transaction alone, the rule might be otherwise. But the interest of society, in whose behalf the act is prohibited, is paramount to private equities."

But where the law authorizes the formation and existence of the alleged corporation, with power to make the contract in question, then a party thereto ought not and cannot be heard in an action thereon by such corporation to deny its due formation or legal existence with the power to make said contract.

Now, in this case, it appears by § 6 of the law of Great Britain, called the "companies act of 1862," that "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of the act in respect of registration, form an incorporated company, with or without limited liability."

Under this law the plaintiff might have been incorporated for "any lawful purpose." Nothing appearing to the contrary, a purpose to construct, purchase, own, operate, or lease a railway is as lawful as a purpose to engage in the manufacture or sale of any of the common necessaries of life. And it was and is at liberty, under the comity of nations, and until the Legislature shall prohibit it, to pursue such purpose or exercise such powers in Oregon. True, it could not acquire the right of way over another's property by appropriation or condemnation as a domestic corporation may do, unless specially authorized by the Legislature. But it might do so with the consent of the owner, and the result would be the same. There is no mystery or monopoly in the railway business in Oregon.

Any natural person or corporation, formed for that purpose,
130 may, if he or it has or can obtain the right of way, construct and operate a railway between any points in this State, and dispose of the same as freely and absolutely as if it were a steamboat or mill.

It follows that the defendant, having taken a lease of this railway from the plaintiff, by its corporate name of "The Oregonion Railway Company, Limited," is estopped, in this action on its covenant in such lease, to pay the rent reserved therein, to deny the corporate existence or due organization of the plaintiff or its power to make such lease. After not a little confusion and uncertainty on the subject this, in my judgment, is the final conclusion reached by the courts and text writers, and the justice and expediency of the rule

has secured it a place in the draft of that well known and considered work, "The Civil Code of the State of New York," in these apt and plain words: "§ 382. One who assumes an obligation to an ostensible corporation, as such, cannot resist the obligation on the ground that there was in fact no such corporation until that fact has been adjudged in a direct proceeding for that purpose."

But by the act of October 21, 1878 (Ses. L., 95), this corporation was placed on the footing of a domestic corporation in Oregon. That act provides "that any foreign corporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway * * * shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers, and privileges" as a domestic corporation formed for such purpose, and no more.

The effect of this act is to make the plaintiff in some respects an Oregon corporation. Its existence, power, and capacity is still derived from and may be measured by the law of Great Britain and the terms of its organization thereunder. But in the exercise of this capacity and power, as owner, builder, or operator of a railway in this State, it comes under and is subject to the regulations and limitations of the Oregon corporation act in the case of domestic corporations of like character and purpose. It may be admitted, then, that if by the law of this State a domestic railway corporation is prohibited from leasing its road, a foreign corporation owning a railway herein would be under the same disability.

However, by the act of October 22, 1880 (Ses. L., 56), entitled "An act to grant The Oregonian Railway Company, Limited, the right of way and station grounds over the State lands and terminal facilities upon the public grounds at the city of Portland," the plaintiff was directly recognized as an existing corporation, lawfully engaged in the construction and operation of a railway in Oregon, from "Portland to the head of the Wallamet valley," and as such there was granted to it "and to its assigns," the owners and operators" of said railway, certain valuable "rights, privileges easements, and property," as suggested in the title thereof.

The effect of this act is clearly to establish, so far as this State and this court is concerned, the legal right of the plaintiff to construct, own, and operate this road, and, in my judgment, to dispose of it, either absolutely or for a term of years. Society *v.* Pawlet, 5 Pet., 501.

The grant therein contained is made to the plaintiff and its "assigns;" while a proviso in section one declares, "That the said Oregonian Railway Company, Limited, or its assigns, shall have no power to sell, convey, or assign the premises or rights hereby granted, or any part or parcel thereof, to any person, persons, firm, or corporation, save only with and as a part and parcel of and as appurtenant to the railway now built and owned by said company, and now in process of construction by it."

Plainly this implies that the plaintiff had the power to assign its road, dispose of it, and might also assign or dispose of "the premises

and rights" then granted to it, in connection therewith, and not otherwise.

Had the defendant the power to make this contract, is the next question raised on this demurrer, though it should properly have been made by a demurrer to the complaint. The denial in the answer of the power of the defendant in this respect does not controvert any fact in the complaint, and is nothing but a conclusion of law or a denial of one.

But the question, however raised, is to be tried by the constitution and laws of the State and the defendant's articles of incorporation thereunder.

The constitution (Art XI, § 2) provides:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes.

"All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested or corporate rights."

On October 11, 1862, the Legislature passed the first act in pursuance of this provision of the constitution (Or. Laws, 524), which, with some comparatively unimportant amendments, has continued in force ever since.

So far as I know it is the next one in point of time to the British companies act of August of the same year, in which the subject of the formation and purpose of corporations is substantially divested of all exclusiveness and restraint, and put on the practical plane, that a corporation is essentially nothing but a partnership, endowed with a capacity of acting as a single person under a particular name, and therefore that any and all persons should be allowed to incorporate themselves for the prosecution or transaction of any enterprise, business pursuit, or occupation not prohibited to individuals or partnerships.

Accordingly this act provides (§ 1) that any three or more persons may incorporate themselves "for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation," in the manner provided therein. All that is required is to make and file articles of incorporation specifying (1) the name and duration of the corporation; (2) the enterprise, business, pursuit, or occupation in which it proposes to engage; (3) the place of its principal office; (4) the amount of its stock and the value of each share thereof; and (5) if it is formed for the purpose of navigating any water or building a bridge, canal, or road, the termini of such navigation, canal, or road, or the site of said bridge.

Subject to the provisions and limitations of the act, these articles of association are the charter of the corporation, and in the prosecution of its undertaking and the management and disposition of its property it is not subject to any other restraint than that which the law may impose in the case of natural persons in like circumstances.

Whatever is not generally forbidden by the law of the land may be undertaken by a corporation thus formed for the purpose. Exclusive privileges are not allowed to any one; and the only policy indicated by the act is to promote the transaction of all kinds of

business by means of corporations to be formed and dissolved at the pleasure of those particularly interested.

Any number of corporations may be formed for the same purpose and at the same place; for instance, to keep a school, a store, a tavern, or to build and operate a steamboat or railway between the same points.

Nor is a corporation formed under this act under any obligation to the public to maintain its existence or carry on its corporate enterprise or business any longer than the shareholders, or a majority of them, may think desirable. Whenever a majority of these, for any reason, vote to disincorporate, the life of the corporation is at an end, except that it may continue to exist for the period of five years thereafter for the purpose of winding up its affairs, including a final disposition of its corporate property, be the same a railway or a fish-wheel. Or. Laws, p. 528, § 19; Ses. L., 1878, p. 91, § 2.

In short, as was lately said by a distinguished jurist, in a brief for this defendant, in a case pending in the U. S. circuit court for the southern district of New York, "The Oregon system may be succinctly defined as free trade in corporations and free corporations."

In the consideration of the question as to the validity of a lease of corporate property made by a corporation formed under this system, the case of Thomas *v.* The Railroad Company, 101 U. S., 71, so much relied on by the defendant, is in some respects altogether inapplicable.

That was a case of a corporation created by a special act of the Legislature of New Jersey to build and operate a certain railway. The court held that the power to lease the road, not being specially given by the act of incorporation, nor fairly implied from anything contained therein, the contract of the corporation to that effect was *ultra vires* and void. In delivering the opinion of the court Mr. Justice Miller says: "Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

This rule is of universal application and applies to a corporation formed under the law of Oregon as well as New Jersey. The articles of association, together with the corporation act under which they are made, constitute the charter of an Oregon corporation, and any act done by such corporation not expressly or by fair implication authorized thereby is *ultra vires* and void.

It was also said in the course of the opinion that the contract of the New Jersey corporation was one "forbidden by public policy," and therefore beyond its power to make.

Whatever a corporation is "forbidden" to do, either directly by statute or a public policy fairly indicated by or deducible from the legislation of a State or country or the decisions of its courts, or both, is of course beyond its power to do. In such case the act is not only beyond the power of the corporation and therefore invalid, but it is prohibited and therefore illegal and incapable of ratification, and

any one dealing with the corporation is not estopped to allege and show such illegality.

131 But the public policy on the subject of leasing railways in a state where corporations are not permitted for the purpose of constructing or operating them, except when created by a special act of the Legislature for the construction or operation of a road between certain points, may be and manifestly is very different from that of a State like Oregon, where any number of corporations may be formed by the voluntary association of individuals to build and operate railways when and where they think best, with power to disincorporate and dispose of their property at their own pleasure. And so, on this point, I do not regard the case of Thomas *vs.* Railroad Company applicable here.

The right of the defendant to make the defense of *ultra vires*, as against the plaintiff, notwithstanding the express provision in its articles authorizing it to lease and operate any railway in Oregon, is already conceded in this opinion, upon the authority of Bigelow on Estoppel (3 ed.), 466. But the authorities are not uniform on the subject. And see Field on Corporations, § 386.

Here it is admitted that the defendant held itself out to the world as a corporation organized to release and operate any railway in Oregon. Luch was the specification in its articles of the power and purpose, among others, of its organization. By this defense of *ultra vires* the defendant does not question the legality of an act done by its directors, without apparent authority or upon a doubtful or questionable construction of its articles, but it seeks to repudiate an act done by them within the plain letter and purpose of a particular power deliberately asserted and assumed by its corporators in the execution of its articles, and to which every one of its shareholders, it must be presumed, thereafter gave his unqualified assent.

It must be admitted that a sense of justice cannot be invoked in favor of such a defense. It must, therefore, stand or fall on the decision of the naked legal question, whether the defendant was authorized in its formation to assume, as it did, the power to lease this or any other railway in Oregon?

The decision of this question involves the inquiry whether the taking a lease of a railway and a covenant to pay the rent reserved therein was an unlawful act in the State at the formation of the defendant corporation and at the date of this lease.

Whatever "enterprise, business, pursuit, or occupation" was then lawful, the defendant might undertake in its articles to accomplish or engage in. There never was any legislative or judicial action in this State, except in one particular to be hereafter noticed, indicating that such a transaction is unlawful or contrary to public policy. To take a lease of a railway and operate it is in itself as lawful and meritorious an act as to construct one. No one would question the right of a natural person to do such an act. And whatever any one may do as an individual, any three or more persons may do as a corporation, unless restrained by some provision of law applicable to corporations only.

The corporation act of this State, as originally passed, contained

a clause (§ 20), in serted on its passage through the Senate at the instance of interested parties, declaring that no corporation formed or created under it or other statute of the State should ever "purchase, lease, or in any way control" any road built by any other corporation formed under such act. This prohibition, it was well understood, was aimed at the Oregon Steam Navigation Company, a corporation then existing under a special act of the Territorial Legislature, and soon afterwards incorporated under the corporation act, in pursuance of § 18 thereof, and the predecessor of the defendant herein, and intended to prevent it from controlling any road that might be built on the bank of Columbia, between Portland and The Dalles, and particularly around the cascades of the Columbia, for the purpose of preventing competition with its steamboats. This is the only restraint on the power of corporations in this respect that ever crept into the legislation of Oregon, and the rational and and legal inference from the premises is that all leases of roads taken by a corporation formed under the act, except the kind thereby specially prohibited, are permitted.

But this is not all. By the act of October 18, 1878 (Ses. L., 59), said § 20 was repealed and re-enacted, so as to omit the restraining clause, and since then there has been no indication of any purpose on the part of the State to restrain or limit the power of corporations in this respect.

The idea of such restraint is also incompatible with the provision of the corporation act (§ 17) that in effect authorizes a railway corporation to terminate its existence at its option and dispose of its road. No natural persons, unless incorporated, are likely to purchase such property, and if there was any implied prohibition against the one corporation from becoming a purchaser, the right given to the other to sell would be so far rendered nugatory. The power to dispose of a road must include the power to lease and the power to buy the power to take a lease. So by the act of October 22, 1880, *supra*, the right of the plaintiff herein to assign its road—to dispose of the same by sale or lease—is recognized; but if a corporation could not be formed or exist under the law of Oregon with power to buy the same or take a lease thereof, the *jus dispomendi* of the former would be comparatively worthless.

Counsel for plaintiff also makes the further point that this is an executed contract, and therefore the defendan t is estopped to allege its invalidity in this action.

It is well established that a contract not tainted with illegality, but merely invalid for want of power in the corporation making it, may be enforced against such corporation when it has received or had the benefit of the consideration therefor. Bigelow on Estop. (3 Ed.), 574–'5; Field on Corpo., § 263.

But this contract does not come within that category. The defendant corporation could not set up the invalidity of this contract as a defense to an action for the rent of the property during a period that it had the use and benefit of the same. But this action is brought on a contract to pay rent in advance and not for past use and occupation. The consideration for the covenant or promise to

pay this installment of rent is not the past but the future use of the property. The contract to pay is therefore executory; and the same may be said of every other installment of rent provided for in the contract. The liability to pay it arises out of the covenant to do so, and the consideration for this is the future use and occupation of the property for a corresponding period.

The case of Thomas *v.* Railroad Company, *supra* (86), is exactly in point on this question.

The effect of the two special defenses will now be considered. They deserve but little attention, for they are both utterly bad. It makes no sort of difference whether the railway leased from the plaintiff had any "near connection" with the roads whose termini are specified in the defendant's articles or not. Those roads it took the power to construct and own; but it also took the power to lease any other railway in Oregon, "whether so near or yet so far" from such roads. As between the plaintiff and the defendant, the directors of the latter were the sole judges of the propriety or expediency of taking this lease, and the assent or dissent of the shareholders was altogether immaterial. They were powerless in the premises, and could neither prevent, authorize, nor ratify it. This does not, of course, question the right of the shareholders to invoke the aid of a court to prevent the directors from making a contract which, though legal, may be improvident or considered an abuse of their trust.

But the power of a corporation formed under the corporation act of this State, as to its relations with third persons, is vested in and exercised by the directors. The power of the shareholders is limited to a few matters concerning its internal affairs, namely, the election of directors, the increasing of the capital stock, the adding to the powers and purposes of the corporation, and the authorizing its dissolution. Nor is it true in any legal sense, even if material, that "the capital of the defendant" was contributed for the construction and equipment of the roads it was formed to build and own rather than the leasing of the plaintiff's road. Nothing is clearer than that every dollar subscribed to the capital stock of the defendant was thereby pledged for any and all of the purposes specified in its articles, and may be applied and used—at least, so far as third persons are concerned—to such of them as the directors shall determine.

In conclusion, the directors of the defendant corporation, in pursuance of the express power given them by the corporation act and the articles of incorporation, determined to take a lease of the plaintiff's road, yielding and paying a certain rent therefor, and to that end duly directed and authorized their president and secretary to sign said lease and affix the corporate seal thereto, which was done. By this means the defendant became legally bound to pay the plaintiff the rent reserved, and in default thereof the latter may maintain this action to recover the installment now due; and therefore the demurrer is overruled, and the motion to strike out is allowed, and judgment is given for the plaintiff for the sum sued for, $68,131, together with legal interest thereon from May 15, 1884, and the costs and disbursements of the action.

Mr. John W. Whalley and Mr. William B. Gilbert, for the plaintiff.

Mr. Cyrus Dolph and Mr. Charles B. Bellinger, for the defendant.

Mr. James C. Carter (of N. Y.) also submitted a written brief for the defendant.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed March 18, 1885. R. H. Lamson, clerk.

131½ And afterwards, to wit, on the 23rd day of March, 1885, there was duly filed in said court a cost bill in words and figures as follows, to wit:

132 In the Circuit Court of the United States for the District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited, Plaintiff,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY, Defendant. } No. 1035.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's fees	$35 10
Marshal's fees	4 72
Costs in lower court	
Advertising	
Depositions	
Attorney's fee	10 00
Attorney's fee for taking three depositions, at $2.50 each	7 50
Master's fees	
Referee's fees	
Disbursements, taking depositions under commission	479 35
Printing brief	64 50
Total	$599 17

Taxed at $599.17.
April 6th, 1885.

R. H. LAMSON, *Clerk.*

132¼ DISTRICT OF OREGON, *ss:*

I, Paul R. Deady, being duly sworn, say that I am one of the attorneys in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that the plaintiff is entitled to recover the same from the defendant.

PAUL R. DEADY.

Subscribed and sworn to before me this March 23rd, 1885.

R. H. LAMSON, *Clerk.*

[Endorsed:] 1035. In the cir. court of the United States for the district of Oregon. Oregonian R'y Co., Lim., plaintiff, *vs.* O. R. & N. Co., defendant. Cost bill. Endorsed: Filed March 23, 1885. R. M. Lamson, clerk, by G. G. Gammans, deputy clerk.

132½ And afterwards, to wit, on the 26th day of March, 1885, there was duly filed in said court a bond in words and figures as follows, to wit:

133 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

THE OREGONIAN RAILWAY COMPANY, Limited,
vs.
THE OREGON RAILWAY AND NAVIGATION COMPANY. } No. —.

Know all men by these presents that we, The Oregon Railway and Navigation Company, as principal, and C. H. Lewis, W. S. Ladd, Henry Failing, and H. W. Corbett, as sureties, are held and firmly bound unto The Oregonian Railway Company, limited, in the sum of one hundred thousand dollars, to be paid to the said The Oregonian Railway Company, limited, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated March 26th, 1885.

Whereas the above-named The Oregon Railway and Navigation Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the circuit court of the United States for the district of Oregon:

Now, therefore, the condition of the obligation is such that if the above-named The Oregon Railway and Navigation Company shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

134 THE OREGON RAILWAY AND NAVIGATION COMPANY,
[Corporate Seal.]
By C. H. PRESCOTT, *Vice-President.*
C. H. LEWIS. [SEAL.]
W. S. LADD. [SEAL.]
HENRY FAILING. [SEAL.]
H. W. CORBETT. [SEAL.]
THE OREGON RAILWAY AND NAVIGATION [CO.],
By THEODORE WYGANT, *Secretary.*

Executed in presence of—
W. T. HUME.

The above bond is hereby approved.

DEADY, *J.*

Endorsed: Filed March 26th, 1885. R. H. Lamson, clerk, by G. G. Gammans, deputy.

134½ And afterwards, to wit, on the 26th day of March, 1885, there was duly filed in said court a writ of error, in words and figures as follows, to wit:

135 *Writ of Error.*

In the Supreme Court of the United States.

THE OREGON RAILWAY AND NAVIGATION COMPANY, Plaintiff in Error,
vs.
THE OREGONIAN RAILWAY COMPANY, Limited, Defendant in Error.
} No. —.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the honorable Matthew P. Deady, one of you, between The Oregonian Railway Company, limited, plaintiff and defendant in error, and The Oregon Railway and Navigation Company, defendant and plaintiff in error, a manifest error hath hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-five, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this March 26, 1885.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of the District Court of the United States for the District of Oregon,
By G. G. GAMMANS,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. The Oregon Railway and Navigation Company, plaintiff in error, *vs.* The Oregonian Railway Company, limited, defendant in error. Writ of error. Filed March 26, 1885. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

135½ And afterwards, to wit, on the 26th day of March, 1885, there was issued out of said court a citation in words and figures as follows, to wit:

136 UNITED STATES OF AMERICA, *District of Oregon*, } ss:

To The Oregonian Railway Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, A. D. eighteen hundred and eighty-five, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein The Oregon Railway and Navigation Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this March 26, 1885.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

136½ [Endorsed:] No. —. U. S. circuit court, district of Oregon. The Oregonian Railway Company, L'd, *vs.* The Oregon Railway and Navigation Company. Citation on writ of error. Filed March 26, 1885. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

STATE OF OREGON, *District of Oregon*, } ss:

Service of the foregoing citation accepted at Portland, in said State and district, this the 26th day of March, A. D. 1885, by delivering to us a true copy thereof in said district on said day and date.

NORTHUP & GILBERT.

137 *Writ of Error.*

In the Supreme Court of the United States.

THE OREGON RAILWAY AND NAVIGATION COMPANY, Plaintiff in Error,
vs.
THE OREGONIAN RAILWAY COMPANY, Limited, Defendant in Error. } No. —.

UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the

Honorable Mattew P. Deady, one of you, between The Oregonian Railway Company, limited, plaintiff and defendant in error, and The Oregon Railway and Navigation Company, defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-—, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this March 26, 1885.

[SEAL.] R. H. LAMSON,
Clerk of the District Court of the United States for the District of Oregon,
By G. G. GAMMANS,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. The Oregon Railway and Navigation Company, plaintiff in error, *vs.* The Oregonian Railway Company, limited, defendant in error. Copy of writ of error. Original endorsed; Filed March 26, 1885. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

138 THE UNITED STATES OF AMERICA, } *ss:*
District of Oregon, }

I, R. H. Lamson, clerk of the United States circuit court for the district of Oregon, do hereby certify that the foregoing copy of record in the above-entitled cause has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this 22nd day of May, 1885.

[Seal Circuit Court of the United States, Oregon.]

R. H. LAMSON, *Clerk.*

Endorsed on cover: Oregon C. C. U. S. No. 922. The Oregon Railway and Navigation Company, plaintiff in error, *vs.* The Oregonian Railway Company, limited. Filed August 31, 1885.